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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. ~~692~~ 36

ALLEGHANY CORPORATION,

Appellant,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION.

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION.

In compliance with paragraph 2 of Rule 13, appellants submit the following statement as to jurisdiction.

Opinion and Judgment Below.

The opinion of the United States District Court for the Southern District of New York rendered November 18, 1955 on final decree is not yet reported and a copy is attached as Appendix A at page 33 hereof. A copy of the first supplemental opinion of that Court, rendered December 23, 1955, also on final decree and not yet reported is attached as Appendix B at page 57 hereof. A Second Supplemental Opinion was rendered on January 27, 1956 and is attached as Appendix C at page 59 hereof. A memorandum opinion constituting an order denying application of Alleghany Corporation (hereinafter "Alleghany") pursuant to F. R. C. P. 59 to set aside a judgment and for a new trial was rendered on January 27, 1956 and is attached as Appendix D at page 60 hereof. Another memorandum opinion, also rendered January 27, 1956, constituting an order denying the application of defendant Baker, Weeks & Co., et al for reargument is attached as Appendix E at page 64 hereof. The final judgment of the District Court, made and entered December 23, 1955, enjoining and setting aside orders of the Interstate Commerce Commission, and enjoining Alleghany from taking action with regard to its 6% convertible preferred stock, from which this appeal is taken, is not yet reported. A copy is attached as Appendix F at page 66 hereof. An order extending a stay granted in the final judgment was made on January 19, 1956. A copy is attached as Appendix G at page 69 hereof.

Because of the voluminous nature of (a) the mesne orders and opinions of the District Court in this action and (b) the relevant Interstate Commerce Commission reports and orders, these are set forth in a separate printed Appendix filed herewith. The majority opinion of the District Court on interlocutory injunction is reported at 134 F. Supp. 132. By inadvertence, Judge Hincks' dissenting opinion has not yet been published. This majority

opinion on interlocutory injunction and the dissenting opinion on interlocutory injunction are attached as Document 1 at page 1 of the separate Appendix. Copy of the order entered below on interlocutory injunction, not reported, is attached as Document 2 at page 41 of the separate Appendix. On application of Alleghany to the District Court, for *supersedeas* pending appeal, after said Court granted interlocutory injunction, Judges Hincks and Dimock disagreed, both rendering memorandum opinions. Copies of these opinions, which are not yet reported, are attached as Documents 3 and 4, respectively, at pages 47 and 48 of the separate Appendix. A copy of the order denying *supersedeas* entered by said judges, and not yet reported, is attached as Document 5 at page 51 of the separate Appendix. On Application to this Court for *supersedeas* pending appeal from interlocutory injunction, Mr. Justice Harlan rendered an opinion reported at 100 L. Ed. (Advance p. 36). The order entered in this Court by Mr. Justice Harlan, not reported, is attached here as Document 6 at page 52 of the separate Appendix. The reports and orders of the Interstate Commerce Commission in Finance Dockets 18656 and 14692 which were invalidated by the District Court's judgment are not yet reported. They are made part of the documents contained in the separate Appendix and numbered and paginated as follows:

7—Report of I. C. C. by Division 4 of March 2, 1955—55.

8—Order of I. C. C. by Division 4 of March 2, 1955—89.

9—Report of I. C. C. by the full Commission of May 24, 1955—92.

10—Order of I. C. C. by the full Commission of May 24, 1955—102.

The reports and orders of the I. C. C. in Finance Docket 1886 are not yet reported. They are made part of the docu-

ments contained in the separate Appendix and numbered and paginated as follows:

11—Report of I. C. C. by Division 4 of May 26, 1955—105.

12—Order of I. C. C. by Division 4 of May 26, 1955—124.

13—Order of I. C. C. by the full Commission of June 22, 1955—126.

The Interstate Commerce Commission report and order of June 5, 1945 (*Chesapeake & Ohio Railway Company Purchase* case), by which that agency originally subjected Alleghany to its jurisdiction and regulation, and reference to which is necessary in order to ascertain the grounds of the judgment in this case, is reported in 261 I. C. C. 239. Reference to a report and order of the Securities and Exchange Commission of October 4, 1945,* which report is reported at 20 S. E. C. 731, and which order is not reported, is necessary to ascertain the grounds of the judgment in this case. Said unreported order is attached as Document 14 at page 128 of the separate Appendix.

Grounds on Which Jurisdiction is Invoked.

Suit was brought under 28 U. S. C., Sections 1336, 1398, 2284 and 2321 through 2325, inclusive, to enjoin, set aside, annul or suspend orders of the Interstate Commerce Commission and to restrain Alleghany from taking action in regard to its 6% convertible preferred stock.

The final judgment of the District Court now sought to be reviewed was dated and entered December 23, 1955. Applications for rehearing and reargument were denied by memorandum opinions constituting orders dated and entered on January 27, 1956. Alleghany filed its notice of appeal on January 31, 1956, in the office of the Clerk

* Inadvertently the District Court refers in its opinion to this report and order as having been promulgated under date of October 25, 1945, rather than October 4, 1945.

of the District Court of the United States for the Southern District of New York.

Jurisdiction of this appeal is conferred by 28 U. S. C. §§1253 and 2101(b). Many cases, including the following, sustain jurisdiction:

Baltimore & Ohio Railroad Co. v. *United States,* 264 U. S. 258; *U. S.* v. *Lowden,* 308 U. S. 225; *U. S.* v. *Marshall Transport Co.,* 322 U. S. 31.

Questions Presented by the Appeal.

1. Whether the District Court correctly held that the Interstate Commerce Commission (hereinafter "I. C. C.") committed error (a) in asserting or continuing to assert pursuant to 49 U. S. C. 5(3) regulatory jurisdiction over Alleghany Corporation (hereinafter "Alleghany") and/or (b) in the administrative proceedings which gave rise to the orders relating to the continuation of Alleghany's status as being subject to I. C. C.'s regulation (hereinafter "status orders")?

2. Whether the District Court correctly held that I. C. C. committed error in making orders (hereinafter "preferred stock orders") which permitted Alleghany to issue shares of its newly authorized 6% convertible preferred stock in connection with the voluntary exchange of such stock for shares of its cumulative 5½% preferred stock, Series A, and to issue shares of its common stock upon conversion of such 6% convertible preferred stock?

3. May there be a review of, and/or do minority stockholders have standing to challenge, under 28 U. S. C. §§1336, 2284, 2321 through 2325, inclusive (a) the status orders, and/or (b) the preferred stock orders?

4. Whether, in all events, the District Court, convened as a statutory three-judge court to review orders of the

I. C. C., erred by failing to limit its decree to enjoining the challenged orders and by broadening its decree to enjoin consummation of the exchange offer at vast damage to Alleghany and to its innocent stockholders?

5. Whether, in all events, the District Court erred in concluding that when a non-carrier not having control of a carrier acquires control of a single railroad system, I. C. C. as a prerequisite to subjecting such non-carrier to regulation pursuant to 49 U. S. C. 5(3) must find the non-carrier's control of the railroad system to be consistent with the public interest?

6. Does not 49 U. S. C. §15(2), which provides that "all" orders of the I. C. C. "shall continue in force until its further order, or for a specified time, accordingly as shall be prescribed in the order, unless the same shall be suspended, or modified, or set aside by the Commission * * *", apply to all orders of the I. C. C. made pursuant to Chapter 1 of the Interstate Commerce Act?

7. Can an ordering paragraph in one of the status orders under attack by plaintiffs, which paragraph purported to terminate an earlier adjudication by order as to Alleghany's status, be effective to nullify the earlier adjudication by order if the status order, of which said ordering paragraph was a part, is adjudicated to be a nullity?

8. In the absence of a further Securities and Exchange Commission (hereafter S. E. C.) order, can an order of that Commission determining that Alleghany had ceased to be a registered investment company, which said order was issued pursuant to Section 8(f) of the Investment Company Act of 1940, (15 U. S. C., §80a-8(f)) and which order provided that it "may be revoked, suspended or modified, after appropriate notice and opportunity for

hearing", lose its efficacy without having been revoked, suspended or modified?

9. Did not the Court err in enjoining, setting aside, annulling and voiding the status orders in so far as they related to Alleghany?

10. Did not the Court err in enjoining, setting aside, annulling and suspending the preferred stock orders?

11. Did not the Court abuse its discretion in granting interlocutory injunction?

12. Assuming that the preferred stock orders were a nullity, does such nullity render Alleghany's 6% convertible preferred stock void?

Statement of the Case.

This case, which is really two cases in one, was commenced on June 15, 1955, by plaintiff-appellees, who claimed to own less than .002%* of the common stock of Alleghany, bringing an action against two defendants, United States of America and I. C. C., to partially enjoin and void two orders in which I. C. C.** determined that Alleghany should continue to be regulated by it. These orders adjudicating Alleghany's status as a "carrier" are hereinafter collectively referred to as "status orders". On June 21, 1955, Alleghany made a motion for leave to intervene in the court proceedings for the purpose of defending the status orders. The next day, I. C. C. issued the second of two other orders*** in another docket (hereinafter collectively

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* Other common stockholders, on final hearing, owning many times the common stock owned by appellees, filed affidavits opposing appellees' position.

** The first order that of Division 4; the second that of the full Commission. Documents 8 and 10 of separate appendix.

*** The first order that of Division 4; the second that of the full Commission. Documents 12 and 13 of separate appendix.

referred to as "preferred stock orders") granting permission to Alleghany to proceed with a voluntary exchange of some 1,300,000 shares of its 6% convertible preferred stock for its 5½% preferred stock. Approximately 40 million dollars in market value of shares of the 5½% preferred stock had been voluntarily deposited by stockholders with the Marine Midland Trust Company, Exchange Agent, when I. C. C. at noon on June 23, 1955, made public its order of the previous day permitting voluntary exchange. No action having been commenced to attack the preferred stock orders and Alleghany not having been admitted to the action attacking the status orders, Alleghany notified the exchange agent that the exchange agent was free to deliver the securities in consummation of the exchange. By the close of business on June 23, 1955, the exchange agent had completed delivery of some 900,000 shares out of the 1,300,000 shares. At 6:30 in the evening of June 23, 1955, an *ex parte* order was signed restraining Alleghany, its transfer agent and the exchange agent, from further issuing, distributing or transferring the 6% convertible preferred stock. On June 24, 1955, plaintiffs served a notice of rejection of Alleghany's motion (which motion had yet not been heard), for leave to intervene in the status order action on the ground that the form of Alleghany's motion for leave to intervene did not comply with certain technical aspects of the Federal Rules of Civil Procedure. On June 28, 1955, Alleghany was permitted to intervene in the action attacking the status orders, the Court in the meanwhile continuing the restraining order. The hearing on interlocutory injunction with regard to the status orders was held on June 28, 1955, and while that application was *sub judice* and eleven days after that hearing, plaintiffs, on July 8, 1955, moved for leave to serve a supplemental complaint which for the first time brought before the Court a basis for an

attack on the preferred stock orders. On July 13, 1955, plaintiffs' application for leave to attack the preferred stock orders came on to be heard. Under the exigencies of the situation, it was stipulated that the Court might then consider the preferred stock orders as well as the status orders.

On July 21, 1955, the Court below rendered an opinion* on interlocutory injunction, and on July 26, 1955, entered an interlocutory injunction.** Later, Mr. Justice Harlan rendered his opinion granting *supersedeas* and made his order granting a partial stay of the interlocutory injunction pending appeal.***

Before such appeal could be heard the case came on for hearing on final decree in September of 1955.

Plaintiffs' principal ground of attack upon the status orders is that when Alleghany on September 17, 1954 joined the New York Central Railroad Company (hereinafter called "Central") and two carrier subsidiaries of Central in applying (under 49 U. S. C. §5(2) and the doctrine of *U. S. v. Marshall Transport Co.*, 322 U. S. 31) for an order approving a lease and merger of the properties of the subsidiaries and approving control by Central and Alleghany of the properties of the merged company, and when I. C. C. granted such application,† it (I. C. C.), in the language of the original complaint:

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* Document 1 of separate appendix.

** Document 2 of separate appendix.

*** Document 6 of separate appendix.

† The application was that the Commission enter an order under 49 U. S. C. §5, *inter alia*, (i) approving and authorizing merger of the properties and franchises of the Louisville and Jeffersonville Bridge & Railroad Company (Bridge Company) into the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (Big Four) for ownership, management and operation of these properties theretofore in separate ownership; (ii) approving and authorizing a sup-

"... illegally and unlawfully arrogated to itself the power to regulate [Alleghany] under the Interstate Commerce Act ..."

The Court below concludes much the same thing in its primary holding on final decree, which is to the effect that I. C. C. "had no power to make any order" subjecting or continuing to subject Alleghany to I. C. C. regulation. The Court below also agreed with contentions of appellees that Alleghany automatically became an unregistered investment company subject to the Investment Company Act of 1940 at an unclearly defined time prior to the promulgation by I. C. C. of the preferred stock orders and that as stockholders appellees were entitled to the protection of the Investment Company Act. The Court takes this position regardless of whether or not Alleghany controlled Central and whether or not outstanding and unrevoked orders of I. C. C. and the S. E. C. provided to the contrary. The theory relied on by the Court for this position is stated alternatively to be that (a) "no acquisition of control" by Alleghany took place on the merger and lease of subsidiaries of Central or (b) procedural errors in the I. C. C. dockets culminating in the status orders rendered such orders inefficacious.

Plaintiffs' July attack on the preferred stock orders, as distinguished from their June attack on the status orders, was primarily on the basis that if I. C. C. lacked jurisdic-

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plemental lease whereby Big Four included the properties of Bridge Company merged into it under a lease of Big Four's properties to Central which had been made January 2, 1930, and several times thereafter amended; (iii) approving and authorizing acquisition by Central and Alleghany of control of the properties and franchises of the Bridge Company; and (iv) the making of an order, as provided by §5(3) of Title 49, that Alleghany should continue to be considered as a carrier subject to the provisions of 49 U. S. C. §20(1) to (10), inclusive, and §20a(2) to (11), inclusive.

tion to issue its status orders, then it lacked authority to issue its subsequent preferred stock orders. Appellees further contended that they were not afforded proper hearing by the I. C. C. in either of these matters and that the I. C. C. acted arbitrarily and capriciously.

In order to fully understand the varied ramifications of this case, it is necessary to trace Alleghany's corporate history back to 1944. At that time Alleghany was registered with the S. E. C. as an investment company under the Investment Company Act of 1940. In 1944 the Chesapeake & Ohio Railway Company (hereinafter "C. & O."), then controlled by Alleghany, filed an application under Section 5(2) of the Interstate Commerce Act, for approval of the acquisition by C. & O. of the properties of a subsidiary, all of whose stock was owned by C. & O. and whose properties were under long-term lease to the C. & O. Pursuant to the *Marshall Transport** case, Alleghany filed an application joining the application of the C. & O. seeking approval under Section 5(2) of control by Alleghany through C. & O. of the properties of C. & O.'s subsidiary. On June 5, 1945, I. C. C. issued an order approving this transaction and ordered that Alleghany, a non-carrier, "unless and until otherwise ordered by the Commission" was to be considered a "carrier" subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11), inclusive, of Title 49 U. S. C. *Chesapeake & Ohio Railway Company Purchase*, 261 I. C. C. 239 (1945).** On October 4, 1945, the S. E. C., pursuant to application under Section 8(f) of the Investment Company Act (15 U. S. C. §80a-8(f))

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* *U. S.* v. *Marshall Transport, supra;* see also *Nicholas Fayette & Greenbrier R. Co. Lease*; 261 I. C. C. 546.

** In the same report, I. C. C. also disposed of a complaint alleging that Alleghany had lost and then reacquired without approval of the I. C. C. control of the C. & O., Nickel Plate, Pere Marquette and Wheeling & Lake Erie Railroads.

ordered that the registration of Alleghany under that Act should cease to be in effect, and further ordered "that if in the future Alleghany ceases to be subject to regulation under the Interstate Commerce Act," its order of October 4, 1945, "may be revoked, suspended or modified after appropriate notice and opportunity for hearing". This order* is still outstanding, unmodified, unsuspended and unrevoked. The reason for the 1945 S. E. C. order was that under 3(c)(9) of the Investment Company Act of 1940 (15 U. S. C. §80a-3(c)(9)) "any company subject to regulation under the Interstate Commerce Act" is defined as not being an investment company within the meaning of the Investment Company Act of 1940.

While still subject to I. C. C. regulation, on January 19, 1954, Alleghany sold control of the C. & O. and simultaneously announced its intention to conduct a proxy fight to acquire control of the Central. At the same time, in the light of its obligations under the I. C. C. order of June 5, 1945 in the *C. & O. Purchase* case, Alleghany notified the I. C. C. that it had divested itself of control of C. & O. and asked to be relieved of conditions in the 1945 order growing out of its control of C. & O., which *inter alia* had required Alleghany to deposit in two voting trusts securities it owned in other carriers. The Chairman of the I. C. C. replied by letter of February 5, 1954, and pointed out to Alleghany that the 1945 order by its terms was to continue in effect until further order of the I. C. C. On May 21, 1954, a few days before the Central proxy fight vote, Alleghany sold the last of its voting shares of The Pittston Company, which shares but for the terms of a voting trust which had been established pursuant to the 1945 I. C. C. order in the *Chesapeake Purchase* case, would have given Alleghany con-

* Document 14 of separate appendix.

trol of another carrier at the same time it controlled the C. & O.

As part of the effort of the then existing Central management during the proxy fight (January to May 1954) to prevent control of Central from passing to Alleghany, Central, recognizing the Commission's continuing jurisdiction over Alleghany by virtue of the 1945 order of the I. C. C.,* petitioned the I. C. C., in April of 1954, praying that the Commission issue an order declaring that Alleghany could not seek control of Central in a proxy fight without prior Commission approval. The Commission dismissed the Central petition. On May 25, 1954, Alleghany prevailed in its proxy fight and elected to Central's Board a slate of directors selected by Alleghany.

Thereafter, on June 22, 1954 the I. C. C. in one of the dockets here under attack issued an order to Alleghany directing Alleghany to show cause why the Commission's order of June 5, 1945 in the *C. & O. Purchase* case should not be terminated. Alleghany responded to that order to show cause by stating that it had no objection to termination of so much of the 1945 order as authorized control of C. & O., but that with respect to that portion of the order subjecting Alleghany to carrier status, Alleghany's relationship to Central was at that time in all material respects similar to its prior relationship with C. & O. It was further stated that there was in course of preparation an application involving lease and merger of two Central subsidiaries, which application would necessarily raise the question of Alleghany's continued status before the Commission, and in the light of the 1945 order would probably result in the

* The C. & O. also recognized the continued effectiveness of the order, though it would have served its purpose to have contended otherwise. So did The Chase National Bank, trustee under a voting trust established by I. C. C.'s 1945 order.

Commission's continuing to subject Alleghany to carrier status. The proceedings on the show cause order were delayed pending the filing on September 17, 1954 of the application in which Alleghany joined involving the lease and merger of the two Central subsidiaries. It was from this application that the status orders, voided below, arose. In both of these status orders the Commission held, *inter alia,* that Alleghany should continue to be considered as a "carrier" subject to the aforementioned provisions of Title 49 U. S. C.

While that merger application was pending before the Commission, appellees, or one or the other of them, or those associated with them, filed or adopted a total of seven pleadings, mostly inconsistent with each other, praying leave to intervene and alleging a variety of reasons why the I. C. C. should not grant the merger and lease application. The Commission ultimately permitted these stockholders to intervene for the purpose of considering their contentions. During the course of the I. C. C.'s consideration of the merger and lease application, it also permitted intervention by the S. E. C. for the limited purpose of considering the S. E. C.'s written arguments as to why I. C. C. should not exercise its concededly plenary jurisdiction over Alleghany. The S. E. C. conceded that I. C. C. had the power to continue to declare Alleghany a "carrier" within its regulatory jurisdiction, but urged, in the exercise of I. C. C.'s discretion, that I. C. C. should either relinquish its jurisdiction over Alleghany or share it with S. E. C. I. C. C. believed under the relevant statutory provisions it had and was required to exercise jurisdiction.

After making the application in September, 1954 which gave rise to the status orders, Alleghany made application in another I. C. C. docket under date of February 16, 1955, for permission to issue a new class of preferred stock (6%

convertible preferred) to be offered for voluntary exchange for its then outstanding 5½% preferred stock, and for permission to issue common stock issuable upon possible conversion.

This application gave rise to the preferred stock orders. Prior thereto, Alleghany had submitted to the S. E. C., for review, its proxy material for use at its February 8, 1955 stockholders meeting. At that meeting holders of all classes of Alleghany securities overwhelmingly approved the proposed exchange, whereupon the new 6% convertible preferred stock was offered pursuant to an exchange offer (also reviewed by the S. E. C.) on the basis of 10 shares of $10 par 6% convertible preferred stock for each share of $100 par Series A 5½% stock. The purpose of this exchange was to eliminate approximately 18 million dollars of dividend arrearages on the Series A 5½% preferred stock, so that the common stock might legally be permitted to receive dividends for the first time in over twenty-five years. Appellees, however, in contra distinction to the position taken by 97½% of the common stock voting at the aforesaid stockholders meeting,* complain that the proposed exchange offer might some day work to the detriment of the common stockholders by reason of the possibility of a dilution in their net asset value per share upon conversion. As indicated above, the delivery of the new 6% convertible preferred stock in consummation of the exchange was halted by the restraining order of the Court below. The restraining order was, in effect, continued by interlocutory injunction and final decree, except as modified by Mr. Justice Harlan's order.** Prior to the I. C. C.'s preferred stock order of June 22nd, the New York Stock Exchange, with the concurrence of the S. E. C., had estab-

* Representing over 70% of the outstanding common stock.

** Document 6 of Separate Appendix.

lished trading in the new 6% convertible preferred stock on a when-issued basis. Regular way trading supplanted the when-issued trading upon the issuance of the second of the I. C. C.'s preferred stock orders, but lasted only until the New York Stock Exchange was apprised of the restraining order, whereupon trading in this security was suspended and has not yet been resumed.

At this point it is necessary to advert to the I. C. C.'s report and order in *Boston & Albany Railroad Company, et al., Control.* After the initial Alleghany-Central application which resulted in the status orders, but before the Alleghany preferred stock application, an application was filed by Central, joined in by Alleghany, requesting authority to acquire direct and indirect control, respectively, through stock ownership of three carriers whose properties had been operated by Central under lease but of which Central had never had stock control. The Commission's report and order approving the application was issued after the status orders but before the preferred stock orders. The District Court rejected Alleghany's contentions that the Commission's order in this proceeding (a) was the legal equivalent of a redeclaration of Alleghany's carrier status, (b) was issued in proceedings free of the jurisdictional and procedural flaws the District Court found in the earlier status order proceedings and (c) accordingly gave the I. C. C. jurisdiction to issue its preferred stock orders.

Alleghany, in December 1955, after the Court below had handed down its opinion on final decree, was faced with the practical problem that if that Court were right it could not transact any further business in the light of 15 U. S. C. §80a-7 without first complying with the terms of the Investment Company Act. Its only alternative, short of filing a notification of registration as an investment company with

the S. E. C., would have been to close its doors until such time as this Court could pass on the question. Faced with this choice, Alleghany filed such a notification of registration, at the same time reserving its rights to terminate such registration when this Court should determine that I. C. C. correctly asserted jurisdiction to continue to regulate Alleghany as it has since 1945.

The Questions Presented Are Substantial.

That the numerous questions presented are so substantial as to require plenary consideration, with briefs on the merits and oral argument, for their resolution by the Supreme Court is apparently conceded even by the District Court from which this appeal is being taken. In recognition of this fact, the District Court's *per curiam* opinion includes Point II of an Appendix expressly "for the convenience of the Supreme Court" as an alternative disposition of the case "should the Supreme Court hold that our interpretation of 49 U. S. C., Section 5(2)(a)(i) is incorrect". This at least tacit recognition by the District Court of the desirability of the Supreme Court of the United States passing on these questions is further buttressed by the District Court's statement that they "on application of the defendants * * * will stay the enforcement of [their] judgment for 30 days to permit them [defendants] to seek and perfect an appeal to the Supreme Court", and by the District Court's incorporation of such a stay in their final decree. The District Court again adverted to the desirability of this Court considering the questions in issue by stating in its January 27, 1956 memorandum opinion denying Alleghany's motions to set aside a judgment and for a new trial:

> "We are advised that a prompt appeal to the Supreme Court is contemplated, and our view is that

> the ends of justice will be better served by an immediate and authoritative determination of the questions raised in the existing record than by a delayed and doubtful nunc pro tunc repair job."

The appeal presents questions requiring a searching interpretation of Sections 5(2) and 5(3) of the Interstate Commerce Act. These interlocked sections empower the Commission to approve, disapprove, or approve conditionally any form of consolidation of carriers (Section 5(2)), and, as an incident to the exercise of this power, to impose regulation upon non-carriers controlling carriers (Section 5(3)). Both sections have extensive historical and legislative backgrounds, but their relationship and scope have never been before this Court except in a restricted context. *United States* v. *Marshall Transport Co., supra.**

A fundamental holding of the District Court was that the I. C. C. lacked power to assert regulatory authority over Alleghany. Needless to say, the immediate result of this determination was to create chaos in the corporate affairs of Alleghany and Central, and in the administrative affairs of I. C. C. Moreover, in the District Court's view, the necessary corollary of this basic determination was the invalidity of the I. C. C.'s authorization for Alleghany's exchange offer to its preferred stockholders. It is this invalidity found by the District Court with respect to the stock issuance which wreaks severe injury upon Alleghany's thousands of innocent stockholders, both preferred and common. Merely to recite the path of reasoning which led the District Court to this end result discloses how numerous,

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* In the *Marshall Transport* case this Court held that when a carrier (Union) controlled by a non-carrier (Refiners) acquired control of the properties and franchises of another carrier (Marshall), the non-carrier (Refiners) must join in the application to ICC.

substantial, and in major degree, novel, are the questions here presented.

Whatever minor procedural flaws may be assumed to have been present, *arguendo*, in the making of the status orders by I. C. C., it cannot be gainsaid that Alleghany is far and away the largest single stockholder of Central, owning upwards of 15% of its stock, and as such should be regulated by the agency designated by Congress [49 U. S. C. §§ 5(3) and 5(2)] to regulate carriers and non-carriers which have the power, as defined in § 1(3)(b) of Title 49, to control carriers.

The Danger to a Corporation of Making the Decision as to Whether a Given Agency which Asserts Jurisdiction over the Corporation Actually has such Jurisdiction.

I. C. C. commenced regulation of the financial affairs of Alleghany in 1945 pursuant to its decision subjecting Alleghany to its jurisdiction in the *C. & O. Purchase* case, *supra*. In that case, C. & O. applied to I. C. C. for authority under Section 5(2) to merge a subsidiary into itself; Alleghany, under the *Marshall Transport* doctrine, necessarily joined in the application as the person controlling the C. & O.; and the I. C. C., as an incident to its approval of the proposed merger, invoked its Section 5(3) powers to compel Alleghany to assume carrier status* and to submit to I. C. C. regulation of its financial affairs. A direct consequence of this I. C. C. report and order was the loss by the S. E. C. of its prior jurisdiction over Alleghany.

The District Court apparently held that the I. C. C.'s order requiring Alleghany to assume carrier status auto-

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* More explicitly that Alleghany "'* * * be considered as a carrier subject to "specified provisions of the Act, relating mainly to the keeping of accounts, t.. making of reports, access to records, the issuance of securities and the assumption of liabilities" * ". See page 34 of *United States* v. *Marshall Transport Co., supra*.

matically terminated at the time when Alleghany relinquished control of the last carrier which it controlled at the time the 1945 I. C. C. order was entered. The District Court brushed aside the fact that the Commission's 1945 order had specifically provided for its continuation until revoked by a later order; that the Commission had continued to exercise its jurisdiction by conducting an investigation into Alleghany's asserted divestment of control of C. & O.; that the Commission had timely issued a show cause order as a basis for determining whether to terminate or amend its 1945 order; and that Section 15(2) of the Interstate Commerce Act specifically provides that orders of the I. C. C. shall continue in force until its further order.* The District Court further brushed aside the 1945 order of the S. E. C. which had terminated the registration of Alleghany as a holding company until further order, to be entered only after notice and opportunity for hearing.

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* The District Court narrowed the application of section 15(2) to rate orders, placing, we submit, undue reliance on a footnote in Mr. Justice Brandeis' opinion in *U. S.* v. *American Railway Express Co.*, 265 U. S. 425, 430, n. 3. The District Court's quotation is lifted out of context and, we submit, when read in context does not support limitation of §15(2) to rate orders. Furthermore, Mr. Justice Brandeis held to the contrary in the *Chicago Junction Case*, 264 U. S. 258, 270. The Court below concedes that the 1945 I. C. C. order might have continued because of §15(2) until May 24, 1955, but takes the position that it terminated on that date (two days before the first of the preferred stock orders), because the status orders, voided by the Court below, by their terms terminated the 1945 order. Obviously, I. C. C. sought to terminate the 1945 order in an ordering paragraph of its status orders in the belief and with the intention that there would be no hiatus with respect to its continuing jurisdiction over Alleghany. One of the very purposes of the order being to continue I. C. C.'s jurisdiction over Alleghany, I. C. C. certainly did not intend, as the decision of the District Court requires, thereby to relinquish its long-standing control over appellant. While the Court below in its opinion relied on that part of the 1955 order in the *Bridge Case* which terminated the 1945 order declaring Alleghany's status as a carrier in its final decree, the Court, perhaps inadvertently, enjoined all parts of the 1955 order including that which terminated Alleghany's status as a carrier under the 1945 order.

The District Court thus overturned orders (1) of the I. C. C. providing that it would regulate Alleghany until its further order, and (2) of the S. E. C. which, in effect, determined that it would not assert regulatory authority over Alleghany until its (S. E. C.'s) further order. Invalidation of these two ten-year old orders was decreed by the District Court in its view that the underlying facts upon which the orders had been predicated had so significantly altered as to destroy the vitality of the orders. Clearly these determinations are of vital consequence to Alleghany and to all corporate enterprises subject to regulation by federal agencies. The District Court's decision imposes an almost anarchic uncertainty in an area where the maximum possible certainty is essential, and subjects corporations and their innocent stockholders to the perils of wrong guessing. This is especially insidious when, as here, the only two administrative agencies which might possibly have jurisdiction, acquiesced in the "wrong guessing". The inherent lawlessness implicit in the essential holding below in regard to orders of administrative agencies asserting and/or declining jurisdiction over a party is reminiscent of the ill-fated position taken by appellants in regard to a court's orders in *U. S.* v. *United Mine Workers*, 330 U. S. 258 (1946). As was said in the concurring opinion in that case at page 312, "If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny." A government of laws and not of men requires obedience to and reliance on orders of a commission irrespective of whether a change in underlying facts has occurred. Obedience to orders of administrative agencies should not penalize those who obey them.

A Change in Form of Control is an Acquisition of Control Within the Meaning of 49 U.S.C. §5(2), So as to Validate I.C.C.'s Jurisdiction over Alleghany.

While the District Court necessarily had to remove the foregoing obstacles on the path to its ultimate conclusion respecting the invalidity of the I. C. C.'s orders authorizing Alleghany's stock issuance, the core of its decision involved its appraisal of the "status orders" issued by the I. C. C. in the proceedings instituted by the application of Central and Alleghany involving the Bridge Company and the Big Four. In that application Central, having stock control of both the Big Four and the Bridge Company, requested I. C. C.'s approval for merging the Bridge Company into the Big Four and the acquisition of operating control by lease, with the resultant taking of an altered form of control of the Bridge Company. Alleghany joined in the application attesting that it had obtained control of Central in a proxy fight. A multitude of I. C. C. decisions have held, with no known exceptions, that when one carrier, though it has control of another, is taking an altered form of control, the Commission's approval must be obtained.*

The District Court recognized that the I. C. C. had jurisdiction under §5(2) to approve or disapprove the basic transaction proposed (i.e., Central's acquiring control in altered form of its two subsidiary carriers as a result of

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* An outstanding example of such a holding is *New York Central Securities Corp.* v. *U. S.*, 54 F. 2d 122, aff'd 287 U. S. 12. In that case, this Court evidenced no doubt that I. C. C. had authority under the then §5(2) to approve the New York Central Railroad's acquiring control by lease of a subsidiary, already controlled by stock ownership. Since (although the Court below perhaps disagrees) it appears to us that Central acquired control by lease in the case at bar of the properties of the Bridge Company which were merged into Big Four, we are at a loss to understand why Alleghany is not the immediate parent of a carrier acquiring control of another carrier, just as was the case with the non-carrier parent in the *Marshall Transport* case.

their merger and the lease). But it held that Alleghany, assuming that it controlled Central, did not have to join in the application since no "acquisition of control" under §5(3) was involved, but merely the substitution of one form of indirect control for another form of indirect control. While the District Court's interpretation of Sections 5(2) and 5(3) is difficult to restate, and the distinctions it found are elusive, the result it reached is all too plain. It held that it was jurisdictionally proper for the I. C. C. to entertain and approve the application in so far as it involved a consolidation of carriers, but that the I. C. C. lacked statutory power to use the application as the basis for asserting or continuing its jurisdiction over Alleghany. This was held to be so because, whether or not the application involved an "acquisition of control" for purposes of Section 5(2), there was, said the lower court, no "acquisition of control" for purposes of Section 5(3).*

The I. C. C. had twice held (though once by indirection) that Alleghany was not required to apply for authority to elect and seat its board of directors in the celebrated proxy fight in the Spring of 1954 for control of Central. During this fight for control, the old management of Central filed a petition with the I. C. C., in proceedings docketed as Docket No. 31530, requesting that the I. C. C. issue a declaratory order to the effect that Alleghany, in seeking to acquire control of Central, was acquiring control of two or more carriers in that Central had stock control of a number of subsidiaries. The I. C. C. heard oral argument and then

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* The District Court seems to have thought that there was no "acquisition of control" under §5(2), and that the jurisdiction it conceded was possessed by the I. C. C. hinged on the fact that there was a merger of carriers. Yet the District Court apparently assumed that Central's joinder in the application was necessary and proper. Central's joinder is only explicable if its acquiring of control of the Bridge Company in altered form was an "acquisition of control" within the meaning of §5(2).

dismissed the petition for a declaratory judgment. During the course of the proceedings on the Bridge Company application which culminated in the status orders here under attack the appellees in their intervention pleadings had asserted that Alleghany had illegally acquired control of the Central.* In these proceedings the I. C. C. squarely faced and disposed of the questions of whether Alleghany had to apply for approval under Section 5(2) as a necessary condition to obtaining or continuing control of Central. The full Commission unanimously interpreted Section 5(2) as not requiring its approval in circumstances where a contestant in a proxy fight took stock control of a major railroad which in fact had stock control of a congeries of railroads historically welded into an integrated system.

The District Court specifically held that the Commission was here wrong. It brought to its opinion the unarticulated but nonetheless apparent conviction that it was paradoxical to believe that Alleghany did not require the Commission's approval to acquire control of the New York Central Railroad System, including the parent company and its many subsidiaries, but that Alleghany and Central did require the Commission's approval to the merger of the Bridge Company into the Big Four. The District Court refused to recognize that the historical purpose of Section 5 is to empower the Commission to control all bringing together or consolidation of railroads, and that its purpose has never been to enable the Commission to pass upon the question of whether shareholders of a parent railroad company, without prior Commission approval, can remove their existing management through regular corporate process and substitute a management more to their liking.

This aspect of the District Court's decision is of critical importance and poses questions whose substantiality can-

* At other times they asserted the express contrary.

not be underestimated. Virtually all rail systems in this country are in fact congeries of corporations, and control of the parent carrier in the historical grouping has frequently passed without Commission approval either as a result of proxy fights or numerous other circumstances. Section 5(4) of the Interstate Commerce Act directs the Commission to investigate any instance in which a person or carrier may be illegally controlling, without its prior approval, one or more other carriers. If the District Court was correct in its vast expansion of what have been the historical limits of the scope of Section 5(2), then the I. C. C. would be obliged to proceed against virtually every railroad management in this country to determine whether its control had the prior approval of the Commission or had been illegally come by. It is, in fact, impossible to conceive of any procedure whereby the I. C. C., even were it so empowered, could grant such advance approval in a circumstance where the acquisition of control might never come to pass and could not, in any case, be presaged with any certainty.

Actions Under the "Urgent Deficiencies Act"* Should be Limited to that Act's Purposes.

Even further questions of great substantiality underlie the District Court's decision. Having focused on the question of I. C. C. regulatory authority over Alleghany to the virtual exclusion of all other questions, and having found that the I. C. C. had no such authority, the District Court then concluded, almost out of hand as we respectfully submit, that Alleghany's stock issuance should be enjoined. Clearly the District Court was here interpreting and apply-

* For convenience of reference we refer to the provisions of Title 28 applicable to review of ICC orders by the designation applied to their forerunner statutes.

ing statutes administered by the S. E. C. Its holding, though it hardly more than adumbrated its reasoning, was that Alleghany, not being subject to I. C. C. regulation, was an unexempted and unregistered holding company under the Investment Company Act of 1940; and that this Act precluded Alleghany's issuance of preferred stock so long as Alleghany was unregistered.

This, although the provisions of Title 28 applicable to review of orders of the I. C. C. have never to our knowledge, except in this case, been used to enforce another Act (Investment Company Act of 1940), even assuming, *arguendo,* the plaintiffs were deprived of any right under such other Act,* without which deprivation the District Court apparently concedes there would not be such harm as to afford appellees standing to sue. Thus far, appellees have succeeded in enjoining orders of the I. C. C. on the theory that they (appellees) have been harmed because they prefer that the corporation of which they are minority common stockholders be regulated by the S. E. C. under the Investment Company Act of 1940. Appellees' success thus far in enforcing the Investment Company Act of 1940 in a suit brought under the Urgent Deficiencies Act, when their ability to privately enforce this Act in any forum is at best doubtful, raises substantial questions as to how far this Court will permit the use of the Urgent Deficiencies Act to be expanded. If appellees may maintain such a suit, then the Urgent Deficiencies Act, with its mandatory right of appeal, may become the vehicle for all kinds of lawsuits never intended to be within its purview. Fur-

* The order of interlocutory injunction, at least impliedly approved in the final opinion, gave as one of the reasons for the injunction that "As found by the Court plaintiffs have the right to invoke the protections of the Investment Company Act against jurisdiction of the Interstate Commerce Commission unlawfully asserted and have no adequate remedy at law to validate that right."

ther, the power of the Court under the Urgent Deficiencies Act to enjoin the exchange offer or an issuance of securities, neither of which transactions is compelled (but merely permitted) by the orders of the I. C. C. under review, poses a question which we believe has never before been answered by a court. Since appellees appear to have a more direct avenue of attack upon the action of Alleghany in reliance upon the preferred stock orders by resort to a suit in a single-judge District Court of plenary jurisdiction, (*Otis* v. *Pennsylvania R. R.*, 61 F. Supp. 905; affd. *per curiam* 155 F. 2d 522), the abuse permitted by the Court below of the remedies afforded by the Urgent Deficiencies Act becomes more apparent.

The Calamitous Consequences to Innocent Parties of the District Court's Determination.

Merely to state the extensive links in the lower Court's chain of reasoning discloses how many problems are implicit in their conclusion. One obvious matter which the District Court first overlooked, and then rejected on rehearing was that the I. C. C. might have otherwise acquired valid regulatory authority over Alleghany. In point of fact there was a proceeding and an I. C. C. report and order in the *Boston & Albany* case which intervened between the Commission's issuance of the status orders and of the preferred stock orders. It is Alleghany's contention that this proceeding constituted the legal equivalent of a redeclaration by the I. C. C. that Alleghany should assume or continue carrier status and, if this be true, it provides an additional reason why the invalidity of the original status orders would not necessarily lead to the invalidity of the preferred stock orders.

From Alleghany's viewpoint, the judgment of the District Court is virtually calamitous in its consequences. The

District Court struck down an exchange offer of immense concern to Alleghany and to all classes of its shareholders; which had been approved by overwhelming majorities of the holders of all classes of its preferred and common stock, after full and fair disclosure to them of the facts surrounding the exchange by means of material submitted to the S. E. C. for review prior to dissemination. The destruction of the exchange offer was decreed by the District Court without any consideration of its essential fairness and desirability. From the dry and sterile conclusion that there were jurisdictional and procedural flaws in the I. C. C.'s assertion of jurisdiction over Alleghany, the District Court swept forward to a destruction of the exchange offer and invalidation of the orders permitting the stock issuance under circumstances which place Alleghany and all its stockholders in extreme distress. Holders of Alleghany's old preferred stock had deposited that stock with an exchange agent and were to receive in exchange the proffered new preferred stock. Nine hundred thousand shares of the new preferred stock were physically delivered to their rightful holders, and 400,000 shares were in the hands of the exchange agent for transmission to the old preferred stockholders, when the District Court's original ex parte restraining order* took effect, precluding any further delivery or transfer of the preferred stock. The cloud thus created still hangs over the stock issue with the result that, despite a partial stay of the injunction with respect to transference of the 900,000 shares delivered prior to the effective date of the restraining order, trading in the entire issue of 6 percent convertible preferred stock continues sus-

* Issued before Alleghany was permitted to intervene in the action and before appellees' complaint had even placed the preferred stock orders in issue or tendered any issue in regard to the preferred stock.

pended on the New York Stock Exchange and the National Association of Securities Dealers has admonished its member firms to refrain from taking part in any trading of this security. Alleghany preferred stockholders, whether they received physical delivery of their new stock certificates or not, thus have had their asset frozen and are unable either freely to sell or hypothecate their Alleghany preferred stock.

Minority Stockholders are Not Entitled to an Evidentiary Hearing in Section 5 Proceedings.

A further important question is presented in the alternative holding of the District Court, which should be heard in full by this Court, as to whether plaintiffs were entitled to an evidentiary hearing before the I. C. C. in the status order dockets. The answer to this question depends on the interpretation of the language of 49 U. S. C. §5(2)(b), which appellants believe makes hearings discretionary with I. C. C. inasmuch as that statute provides, in relevant part:

> "• • • a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest."

The Court below has negated I. C. C. discretion to hold hearings in Section 5 cases by reliance on notification language in another part of that statute. If every stockholder of corporations subject to I. C. C.'s jurisdiction has an independent right to an evidentiary hearing in Section 5 proceedings, then (even as in this case after their views have been determined adversely to them by the overwhelming vote of fellow stockholders) they may continue to thwart the will of the majority by harassing the corporation in hearings before the I. C. C. and later by further review in

the courts as to the adequacy of their hearing. Illogically, the lower Court emphasizes stockholder rights to an evidentiary hearing in the status dockets, while at the same time apparently conceding that appellees would have no right to review the status orders were they standing alone. Indeed, when the proceedings with respect to the status orders were being contested by the stockholder appellees before the Commission, no preferred stock orders had yet been promulgated.

Prior Court Decisions Have Been Disregarded as to the Standing of Minority Stockholders to Sue and the Right to Review these Orders of I.C.C.

In any case, the question of the extent to which minority stockholders or other parties may have a review under the Urgent Deficiencies Act of orders of the I. C. C. had, we thought, been largely set at rest by the holding in *Pittsburgh & West Virginia Ry. Co.* v. *U. S.*, 281 U. S. 479, and other cases construing that case, but the opinion of the Court below suggests the contrary.

In addition, the District Court has in our view stretched the holdings, on reviewability of orders of the types here in issue, of *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, and such allied cases as *Shannahan* v. *U. S.*, 303 U. S. 596 (1930); *East Ohio Gas Co.* v. *F. P. C.*, 115 F. 2d 385 (1940), and *Canadian River Gas Co.* v. *F. P. C.*, 110 F. 2d 350 (1940), cert. den., 300 U. S. 693, so that they have become unrecognizable. Furthermore, *Rochester Telephone Corp., supra,* is the only authority cited by the District Court in support of their novel proposition that unreviewable orders (status orders) become reviewable thereafter by reason of the fact that later orders (preferred stock orders) may be reviewable. That case does not, we submit, stand for that proposition. Though appel-

lants believe the later orders (preferred stock orders) were not reviewable because they were permissive (*New York Central Securities Corp.* v. *U. S.*, 54 F. 2d 122, aff. 287 U. S. 12; *Miller* v. *U. S.*, 277 F. 95 (S. D. N. Y., 1921); *Pittsburgh & West Virginia Ry. Co.* v. *I. C. C.*, 293 F. 1001 (C. A. D. C., 1923); *Pittsburgh & West Virginia Ry. Co.* v. *U. S., supra*), it is hard to see how even if the preferred stock orders were reviewable, their reviewability can give rise to a right to review earlier orders which the Court below impliedly concedes, standing alone, would be unreviewable. No decision of this or any other court has to our knowledge ever so held. If this view is upheld, since there is no statute of limitations for review of an order of the I. C. C., any plaintiff who claims to be harmed by an order (other than one determining status) might also review a status order of many years standing, and if harmed by the later order, void every act, contract made, and security issued, by a corporation which, in obedience to the earlier status order, had attorned to the administrative agency's jurisdiction.

Conclusion.

We respectfully submit that the District Court passed upon a series of important and substantial questions and that it incorrectly determined these questions. It has held that the I. C. C. lacked regulatory authority over Alleghany, which holding was delivered in such a context of circumstances as to make the holding of wide significance in the administration of the Interstate Commerce Act. It has further held, in form almost as an incidental consequence of its first holding, that the I. C. C. orders approving Alleghany preferred stock issuance are invalid, which holding

was delivered again in such a context of circumstances as to be of great importance and substantiality in general, and calamitous to Alleghany and its stockholders in particular.

The Court should note probable jurisdiction in this case.

Respectfully submitted,

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Dated: February 7, 1956.

Appendix A.

Opinion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BRESWICK & Co., and RANDOLPH PHILLIPS, as common stockholders of ALLEGHANY CORPORATION,

Plaintiffs,

v.

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, THE NEW YORK CENTRAL RAILROAD COMPANY, JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership, doing business as GRUSS & Co., and SAMUEL A. MEHLMAN,

Defendants.

Before: FRANK, Circuit Judge,

and

DIMOCK and WALSH, District Judges.

This is an action to enjoin, or vacate and set aside as void, orders of the Interstate Commerce Commission.

Rosston, Hort & Brussel (George Brussel, Jr. and Eugene G. King, of counsel) for Breswick

Randolph Phillips, *pro se*

Herbert Brownell, Jr., Attorney General of the United States (Paul W. Williams, United States Attorney for the Southern District of New York, of counsel) for United States

Leo H. Pou, Washington, D. C., for Interstate Commerce Commission

White & Case and Wheeler & Wheeler (Edward K. Wheeler, David Hartfield, Jr., Robert G. Seaks, Andrew O. Miller and Morton Moskin, of counsel) for Alleghany Corporation,

Proskauer Rose Goetz & Mendelsohn, for intervening defendants, Joseph S. Gruss, *et al.*

Harold H. McLean and Edward K. Wheeler, for New York Central Railroad Company

Samuel A. Mehlman, *pro se*

PER CURIAM:

Since the filing of our previous opinion dealing with the preliminary injunction,[1] and of our order granting such an injunction, we have held a hearing on the merits, at which we received evidence, heard extensive arguments, and received elaborate briefs, concerning final relief.[1a] As a result, we adhere, for the most part, to what was said in the previous majority opinion.

1. However, we now think the following considerations are pivotal: Defendants' chief contention runs thus: (1) Under the doctrine of *United States* v. *Marshall Transport Co.*, 322 U. S. 31, Alleghany was a necessary party to the merger proceedings. (2) The Commission, by its order in those merger proceedings, held it in the public interest that, by the merger, Alleghany should acquire control of the Bridge Company. (3) That order, authorizing Alleghany to acquire that control, made Alleghany, pursuant to Section 5(3), a carrier for purposes of Section 20(a).

We think item (1) of this argument untenable. For, assuming, *arguendo*, that, before the merger, Alleghany

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[1] The majority opinion is reported at 134 F. Supp. 132. By inadvertence, Judge Hincks' dissenting opinion has not yet been published.

[1a] Chief Judge Clark duly designated Judge Frank in place of Judge Hincks who was unable to sit because of illness.

already controlled New York Central,[2] we think the merger of Bridge Company and Big Four did not involve any further acquisition by Alleghany, a non-carrier. We rest this conclusion on an analysis of 49 U. S. C. 5(2)(a)(i). For convenience, we print, as follows, its provisions in separate sub-paragraphs, assigning each sub-paragraph a Roman number:

"It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(I) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or

"(II) for any carrier, or two or more carriers, jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or

"(III) for any carrier, or two or more carriers, jointly, to acquire control of another through ownership of its stock or otherwise; or

"(IV) for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or

"(V) for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; . . ."[3]

Sub-paragraphs (I), (II), and (III) deal solely with carriers. Sub-paragraph (I) deals with a merger, (II) with a purchase, lease or contract to operate, and (III) with a case where a carrier or carriers seeks to "acquire control." In contrast, sub-paragraph (IV) and (V) deal solely with situations which involve "a person which is not a carrier";

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[2] As to which, see point II of the Appendix to this opinion.

[3] Section 5(2)(a)(ii) reads: ". . . or for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

as to such a person, those two sub-paragraphs significantly say nothing whatever about a merger, but relate exclusively to cases in which a non-carrier seeks to "acquire control."

A merger of carriers may involve an acquisition of control by a non-carrier, where, through the merger, the non-carrier acquires control (direct or indirect) of a carrier or carrier property which the non-carrier had previously not controlled; *United States* v. *Marshall Transport Co.*, 322 U. S. 31. But where, as in the instant case, the non-carrier (Alleghany) is (according to our assumption, *arguendo*,) already in indirect control of a carrier (Bridge Company), and the merger still leaves the non-carrier in indirect control of such property, no acquisition by the non-carrier results from the merger.[4] This seems to us the plain, clear and obvious interpretation of the statute. Therefore, *United States* v. *Marshall Transport Company*, *supra*, is inapposite. We think the Commission had no power to make any order, in the merger proceedings, which authorized the Alleghany Corporation to "acquire control" of Bridge. Accordingly, so much of the order as purported to do so was a legal nullity.

Defendants argue that this interpretation of Section 5(2)(a)(i) is erroneous because the Commission's decisions disclose a contrary well-settled administrative interpretation of that section. We find no such well-settled administrative interpretation. See point I of the Appendix to this opinion, where we discuss the pertinent Commission decisions; it shows that the Commission's interpretations have been not at all consistent and uniform. We assume, *arguendo*, that, were they clear, uniform and consistent, we would be obliged to abide by them (a proposition by no means certain when the administrative interpretation is patently irrational).[5] But when administrative interpre-

[4] The merger proceedings also involved approval of a lease of Bridge Company's property to New York Central; again, that transaction involved no acquisition of control by Alleghany of property which it had not previously controlled.

[5] See the opinion of Judge Learned Hand in *Kandelin* v. *Social Security Board*, 136 F. (2d) 327, 328 (C. A. 2).

tations lack consistency and uniformity, the courts give them little or no weight.[6]

Alleghany did not seek, nor did the Commission enter, any order approving Alleghany's control of New York Central as in the public interest. Consequently, assuming, *arguendo,* that Alleghany had acquired control of Central, there is no Commission order, under Section 5(2) which brings Alleghany within the Commission's jurisdiction under Section 5(3).

2. Defendants contend, in the alternative, that Alleghany still has the status of a carrier by virtue of the ICC's order of June 5, 1945. We rejected that contention in our previous opinion, and see no reason for abandoning that rejection. Alleghany points to 49 U. S. C. Section 15(2) which provides that "all" orders of the ICC "shall take effect within such reasonable time, not less than thirty days, and shall continue in force until its further order, or for a specified time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the Commission. . . ." But we think Section 15(2) must be read in connection with Section 15(1) which relates solely to rate orders or the like. A single sentence in the opinion of *The Chicago Junction* case, 264 U. S. 258, 270 (per Brandeis, J.) otherwise intimates. But subsequently, in *United States* v. *American Railway Express Co.,* 265 U. S. 425, 430, n. 3., the Court (again per Brandeis, J.) said: "Paragraph 2 of Section 15 deals only with the time

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[6] *United States* v. *Missouri Pacific R. Co.,* 278 U. S. 269, 280; *Burnet* v. *Chicago Portrait Co.,* 285 U. S. 1, 16; *Alexander* v. *Cosden Pipe Line Co.,* 290 U. S. 484, 498; *Estate of Sanford* v. *Commissioner,* 308 U. S. 39, 49-54; *American Surety Co. of New York* v. *Bethlehem National Bank,* 314 U. S. 314, 319; *United States* v. *Healey,* 160 U. S. 136, 145; *Merritt* v. *Cameron,* 137 U. S. 542, 551-552; *Isbrandtsen Co.* v. *United States,* 96 F. Supp. 883, 891 note 23. See also annotations in 73 L. Ed. 345-349, and 84 L. Ed. 47-50.

when orders under paragraph 1 take effect.'"[7] It is noteworthy that Section 16(6) dealing with the suspension or modification of orders of the Commission contains no clause continuing them in effect until such suspension or modification.

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[7] This subsection of the Act is set forth under the heading: "Determination of Rates, Routes, etc.; Routing of Traffic; Disclosures (of routing), etc."

It was inserted in the Act by amendment of February 28, 1920, after Interstate Commerce Commissioner Clark had so requested on behalf of the Commission, at hearings on H. R. 4378 before the House Committee on Interstate and Foreign Commerce, held on July 15, 1919, p. 28. The legislative record makes clear that the ICC sought the amendment because of questions relating to the duration of its rate orders.

Under the heading "Power of Commission to Fix Rates", H. R. No. 456 on the Transportation Act of 1920 states, after a discussion limited solely to rates and routing orders:

> "The amendment also provides that orders of the Commission shall continue in force until its further order in lieu of the existing law which provides that they shall continue in force for not exceeding two years. The existing law provides that the Commission may suspend schedules of rates filed with it for 120 days, and for a further period not exceeding six months."

The 1920 Act amended 15(2) as then existing, and changed it to its present form. In explaining the amendment on the floor of Congress, Chairman Esch of the House Interstate and Foreign Commerce Committee stated:

> "We also change the existing law which requires rates, fares and charges to remain in existence for a period of two years after the determination of the Commission. We provide no limit, believing that it is wiser to have no fixed limit. Some of the Shreveport cases were pending for practically two years. It is easy to conceive of a case that might continue for almost two years, and if the present law remained in effect it would mean that the rates established after a long and expensive litigation might become operative for a period much less than the two years." 58 Cong. Rec. 8317 (66 Cong. 2d Session).

Moreover, before 1920, there was no separate subsection 2 in section 15. A similar provision was imbedded in a paragraph in Section 15 relating solely to rate regulation and the like, and it would have been difficult to argue that such provision applied to ICC orders issued under other sections of the Act. See 34 Stat. 589; 36 Stat. 551.

Accordingly, when Alleghany divested itself of the control of all carriers, the order of June 5, 1945, became inoperative.[7a] This occurred before the ICC order authorizing Alleghany to issue its new preferred. But, even if we are wrong in this respect, there remains the fact that the ICC, in its "status" order, issued by Division Four on March 2, 1955, and affirmed by the full Commission on May 24, 1955, expressly terminated the June 5, 1945 order so that when, on June 22, 1955 the ICC purported to authorize the issuance of the preferred stock, the June 5, 1945 order had already been explicitly nullified.

Consequently, as Alleghany was not within ICC regulation when it proposed to issue its new preferred stock, the issuance of that stock would violate the Investment Company Act for this reason: The SEC order of October 25, 1945, which terminated Alleghany's registration under the Interstate Commerce Act, ceased to have any effect, at the very latest, on May 24, 1955, and Alleghany was then forthwith within the coverage of the Investment Company Act. Alleghany could not thereafter lawfully issue any new securities because of Section 7 of that Act, 15 U. S. C. Section 80a-7.

Alleghany contends, however, that the SEC order of October 25, 1945, exempted Alleghany from the Investment Company Act; that, to bring Alleghany within the coverage of the Act required another SEC order; and that no such order has been entered. We cannot agree for this reason: Section 3(c)(9) of that Act, 15 U. S. C. Section 80a-3(c)(9), exempts from that Act's provisions any company subject to ICC regulation. The SEC order of October 25, 1945 was but a formal recognition of that exemption, which became operative when the ICC made its order of June 5, 1945, since, by that order, Alleghany became subject to ICC regulation. When, however, at the latest on May 24, 1955, the

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[7a] Alleghany, on January 19, 1954, had divested itself of the control of all but one carrier, the United States Trucking Company, which it controlled through its ownership of the stock of the Pittston Company. On May 21, 1954, it ceased to control even that one carrier.

June 5, 1945 ICC order lost its efficacy, thereupon the SEC order of October 25, 1945 became automatically inefficacious, with the result that Alleghany immediately became again subject to the Investment Company Act.[8]

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[8] The SEC, in its opinion accompanying its order of October 25, 1945, 20 SEC 731, said that, if Alleghany in the future ceased to be subject to regulation under the ICC Act, "The order may be revoked, suspended, or modified after appropriate notice and opportunity for hearing."

We think that, since that order was not entered in the exercise of the discretion of the SEC, but was entered perforce, this language did not have the effect of excluding Alleghany, when it ceased to be subject to ICC regulation, from the Investment Company Act until a further order of the SEC.

In a memo filed on August 1, 1955, by the SEC with Mr. Justice Harlan on a motion to stay enforcement of our preliminary injunction order, the SEC stated:

> "It will be noted that Section 3(c) of the Investment Company Act states that 'none of the following persons is an investment company within the meaning of this title,' including under subsection (9) thereof a company which is 'subject to regulation under the Interstate Commerce Act.' Such exclusion from the Act is automatic by statutory definition and is not dependent upon an order of the SEC. The SEC order entered in 1945 was made for the purpose of giving formal recognition to that status, since Alleghany had theretofore been registered as an investment company under the statute. Had Alleghany never been registered under the Investment Company Act, a formal order declaring its status would not have been necessary, and its exclusion from the Act would have been *ipso facto* applicable solely by virtue of the assumption of regulatory jurisdiction by the ICC. The effect of the SEC's 1945 order served merely to extinguish the prior registration of Alleghany, and as such Alleghany assumed the position of any other company, such as banks, insurance companies, underwriters, and others automatically excluded by the Congress from the definition of an investment company under Section 3(c). So considered, it may be argued that Alleghany should enjoy no greater privilege or right than that accorded to any other company excluded from regulation under the Investment Company Act. Under this approach, if Alleghany lost its status under Section 3(c)(9) it must effect compliance with the Investment Company Act as a condition of doing business, namely, it must register as an investment company and comply with the various provisions of that Act. Absent registration, Section 7 would prohibit Alleghany from engaging virtually in any transaction in interstate commerce, including the proposed offer of exchange."

Alleghany cites *SEC* v. *Long Island Lighting Co.*, 148 F. (2d) 252 (C. A. 2), judgment vacated on the ground of mootness, 325 U. S. 833, and *In re United Corporation*, 128 F. Supp. 725, as authority in support of its contention that the October 25, 1945 order of the SEC continued in effect. The *Long Island Lighting Company* case is inapposite.[9] There the SEC had exercised the discretionary power granted to it under Section 3(a) of the Public Utility Holding Company Act—15 U. S. C. Section 79c(a)—to exempt the company from the registration and regulatory provisions of the Public Utility Holding Company Act. Accordingly, before the company could again be subject to the Public Utility Holding Company Act, it was necessary that the SEC take action authorized by 15 U. S. C. Section 79c(c) to revoke its prior exemption order.[9a] The statute involved in the instant case is materially different from that in *Long Island Lighting Company*. Here the exemption from the Investment Company Act under Section 3(c)(9) was not at all discretionary with the SEC;[9b] the exemption depended upon the fact that Alleghany, controlling carriers, came within ICC regulation through the ICC order of June 25, 1945. As we said above, when that order lost its effect, the SEC order of October 25, 1945 likewise lost its effect.

In re United Corporation, 128 F. Supp. 725, dealt with a contention of preferred stockholders that the district court was without jurisdiction to approve the second half of a plan, under Section 11(e) of the Public Utilities Act,

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[9] See the comment of the Court of Appeals on that case in *West India Fruit S.S. Co.* v. *Seatrain Lines*, 170 F. (2d) 775 (C. A. 2).

[9a] *Morris* v. *SEC*, 116 F. (2d) 896 (C. A. 2), also cited by Alleghany, involved a discretionary exemption by the SEC under 3(a)(5) of the Public Utilities Holding Company Act, 15 U. S. C. Section 79c(a)(5), and is distinguishable on the same grounds as the *Long Island Lighting Company* case.

[9b] Compare 15 U. S. C. Section 80a-6(c) of the Investment Company Act which gives the SEC discretionary power to exempt a company from the Investment Company Act. This section was not involved in the instant case since the termination of Alleghany's registration was based solely upon 15 U. S. C. Sections 80a-3(c)(9) and 80a-8(f) of the Investment Company Act. See 20 S. E. C. 731.

providing for the elimination of option warrants held by the preferred stockholders after the completion of the first part of the plan, which required the sale of subsidiaries in order to transform the company from a public utilities holding company into an investment company. Since a single and unified plan was involved, we think the district court correctly rejected the preferred stockholders' contention. However, we do not agree with the district court's statement that it had jurisdiction because the SEC had not yet made an order terminating its jurisdiction.

3. The previous opinion held that the ICC orders are reviewable and that the plaintiffs have "standing to sue." We adhere to this ruling but modify our discussion to this extent: Defendants rely primarily on *New York Central Securities* v. *United States*, 54 F. (2d) 122, affirmed 287 U. S. 12, as authority for their contention that plaintiffs have no such standing. We think that case at most holds that a stockholder cannot, in a suit under the Urgent Deficiencies Act, assert harm to the corporation;[10] it does not hold that he cannot assert a threatened direct harm to himself as a stockholder. Such a threatened harm exists here, since the right to convert the preferred into common stock may dilute the interest of plaintiffs as common stockholders of Alleghany.[11] The fact that all the common stockholders are threatened with harm does not convert an injury, individual to each common stockholder, into an injury to the corporation which cannot be enforced except derivatively. Nor is it relevant that many of the injured common stockholders have approved Alleghany's action and do not chose to oppose it. Since the plaintiffs are threatened with harm as individuals, it suffices that they owned Alleghany stock when they brought suit.

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[10] We need not here consider whether a stockholder could do so derivatively.

[11] Although the common stockholders could not complain about a dilution of their interest by a lawful issuance of convertible preferred approved by the SEC under the Investment Company Act, they may assert, as a direct injury to themselves, a dilution of their shares by an unlawful issuance of stock pursuant to a void ICC order.

4. The order granting Alleghany carrier status and approving the issuance of the new preferred stock is reviewable under the test enunciated in *Rochester Tel. Corp.* v. *United States*. 307 U. S. 125. Rochester held that, when an administrative order causes a plaintiff some individual harm, he may seek review of the administrative action in the courts, but that, until the administrative action causes such harm, no review is possible, since the suit would ask "review of interim steps in a proceeding" and would therefore be premature. Although the plaintiffs perhaps suffered no injury from the ICC order granting Alleghany carrier status, they were surely threatened with serious harm by the second order approving the issuance of the new preferred stock. Thus, while the status order, by itself, may not have been reviewable, nevertheless, once the ICC made its order approving the issuance of the new preferred, there arose a right to seek review of the preferred stock order and also of the status order on which the preferred stock order was based.

5. In the majority opinion on the preliminary injunction, it was held that plaintiffs had shown that they were entitled to injunctive relief. The showing necessary to justify a preliminary injunction is probably greater than that necessary for final injunctive relief. See our opinion on the preliminary injunction; see also Restatement of Torts, Section 933, special note at p. 683, as to "inadequacy," and cf. Section 936(2) and Comment d. It follows that the plaintiffs are entitled to final relief.

6. The intervening preferred stockholders urge that we should deny this relief because they have changed their position in reliance upon the orders of the I.C.C.[12] But, as

[12] These intervening stockholders make much of the fact that they and others like them have invested millions of dollars in the preferred stock, whereas the plaintiffs only own a small amount of common stock. The small amount of stock owned by plaintiffs is irrelevant. See, e. g., *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, 115; *Subin* v. *Goldsmith*, 225 F. (2d) 753 at 761 (C. A. 2).

we observed in our previous opinion, any such reliance was upon void orders. The Investment Company Act, and some other statutes relative to the SEC, specifically provide that one who, in good faith, relies on the Commission's "rule, regulation or order" shall be protected from liability imposed by the statute even if later a court holds it invalid.[13] Significantly, the I.C.C. statute contains nothing of the sort.[14]

7. On the basis of the foregoing, the order approving the issuance of Alleghany's preferred stock must be set aside as null and void. There is no occasion to remand to the Commission since, in the merger proceedings, no further evidence or findings could validate that order. Any future effort by Alleghany to obtain a Commission order approving Alleghany's control of Central, as in the public interest, would require entirely new and independent proceedings; no order entered therein could, retroactively, render valid the Commission's order with reference to Alleghany's preferred stock.

8. Should the Supreme Court hold that our interpretation of 49 U. S. C. Section 5(2)(a)(i) is incorrect, the necessity would arise to consider several matters, many

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[13] The Investment Company Act provides (15 U. S. C. Sec. 80a-37(d)): "No provision of this subchapter and sections 72(a) and 107(f) of Title II imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule, regulation, or order of the Commission, notwithstanding that such rule, regulation, or order may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason." For similar provisions in other acts, see 15 U. S. C. Sec. 80b-11(d) (Investment Advisers Act); 15 U. S. C. Section 79t(d) (Public Utility Holding Company Act); 15 U. S. C. Sec. 77sss(c) (Trust Indenture Act).

[14] There is not before us the question whether Alleghany may be liable to preferred stockholders for any loss they may suffer.

of which were discussed in our previous opinion.[15] For the convenience of the Supreme Court, we have set forth, as point II of the Appendix to this opinion, our findings and conclusions as to those matters, and what would be our alternative disposition of the case.

A judgment will be entered setting aside the Commission's orders with reference to Alleghany under Section 5(2)(a)(i) and also its order with reference to the Alleghany preferred stock. However, on application of the defendants, we will stay the enforcement of our judgment for 30 days to permit them to seek and perfect an appeal to the Supreme Court. All motions for intervention are hereby granted.

JEROME N. FRANK

Jerome N. Frank, U.S.C.J.

EDWARD J. DIMOCK

Edward J. Dimock, U.S.D.J.

LAWRENCE E. WALSH

Lawrence E. Walsh, U.S.D.J.

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[15] We grant plaintiffs' motion to amend their complaint to allege that they are suing on behalf of all common stockholders similarly situated. We think the amendment will have no significance, however, unless the alternative basis of decision, set forth in point II of our Appendix, becomes operative. For the amendment will do no more than render the action a spurious class suit and thus allow other common stockholders to join as plaintiffs, if they so desire. See *York* v. *Guaranty Trust Co.*, 143 F. (2d) 503, 518 (C. A. 2); *Dickinson* v. *Burnham*, 197 F. (2d) 973, 978 (C. A. 2).

Appendix I.

Defendants' present contention, that Alleghany was a necessary party to the proceeding before the I. C. C. for approval of the merger of Big Four and the Bridge Company, is claimed to be based on a consistent and uniform administrative interpretation of clause 5 of Section 5(2)(a) and of the holding of *United States* v. *Marshall Transport Co.*, 322 U. S. 31 (1944). The asserted uniform administrative construction is that a non-carrier holding company again "acquires control" of already controlled subsidiaries or property whenever there is an internal rearrangement within its system of carrier subsidiaries, and that when such an "acquisition of control" occurs, remote parents as well as immediate parents are necessary parties and are required to join in the application under this section.

Actually, the Commission has not been consistent in holding intra-system rearrangements to be acquisitions of control, even by the immediate parent of the rearranged companies; and it has never found such a rearrangement to be an acquisition of control by a parent other than the immediate parent. Further, it has never required a parent other than the immediate parent to join in the proceeding as a necessary party.

The absence of administrative consistency is most evident in cases involving factual situations similar to the present one, in which the transaction requiring I. C. C. approval was a merger between two subsidiaries of a single parent, or the purchase by one subsidiary of the property and operating rights of another.

In one case the I. C. C. approved the proposed merger without making any finding on the question of acquisition of control or necessity for joinder by the immediate or remote parent of the merged subsidiaries. *Scott Bros., Inc.-Merger*, 45 M. C. C. 196 (1946).[1]

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[1] Scott Bros. and Peninsula, a wholly owned subsidiary of Scott, applied to the I. C. C. for approval of the merger of Peninsula into Scott; the I. C. C. approved the merger and authorized the "acquisition of control" of Peninsula by Scott. It failed to find an acquisition of control by Scott's parent, American Co., or by Pennsylvania Railroad, American's parent and the ultimate parent of the system, or to require their presence as necessary parties.

In another it approved the purchase by one subsidiary of the operating rights and property of another and specifically dismissed their parent's application to "acquire control" as a result of the purchase. *Pratt's Express Co.-Purchase-Security Warehouse Company,* 39 M. C. C. 834 (1944).

In a third it approved the purchase by one subsidiary of the operating rights of another, found an acquisition of control by the buyer's immediate parent, but made no finding that the immediate parent or the remote parent of the system were necessary parties. *United Parcel Service of Portland—Purchase—Wiese,* 37 M. C. C. 473 (1941).[2]

In a fourth it approved the purchase by one subsidiary of the operating rights and property of another, but made no specific finding that the parent of the combined subsidiaries (whose presence in the proceeding was required for approval of another transaction), acquired control of the combined subsidiaries as a result of the purchase. *Chesapeake & O. Ry. Co. Purchase,* 261 I. C. C. 239 (1945).[3]

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[2] United Parcel Service of Portland, a subsidiary of United Parcel of Nevada, which was in turn a subsidiary of United Parcel of Delaware, sought to purchase the operating rights of one Wiese. Previously Wiese had operated under Portland's control by contract; he was an officer of Portland, leased his trucks from it, and his rent and income were so fixed that he had neither profit nor loss. After the proposed sale Wiese would no longer operate his business independently. The I. C. C. found an acquisition of control by Nevada as well as by Portland. It found no acquisition of control, however, by Delaware and did not require the presence of either Nevada or Delaware as necessary parties.

[3] The I. C. C. approved, retroactively, the acquisition of control of Chesapeake & Ohio, Nickel Plate and Pere Marquette by Alleghany under Section 5(2). It also approved a purchase of the property and operating rights by the C. & O. of its subsidiary, Norfolk Terminal. C. & O. already controlled the Norfolk by stock ownership and lease. Alleghany joined in C. & O.'s petition for I. C. C. approval of the purchase of Norfolk Terminal. The I. C. C. made no finding that Alleghany acquired control as a result of Norfolk's purchase by C. & O. Nor does the Commission's opinion suggest that Alleghany would have been a necessary party to that application.

Finally, in two cases, it found an acquisition of control and a necessity for joinder by the immediate parents of the merged subsidiaries. *Pere Marquette Ry. Co. Merger*, 267 I. C. C. 207 (1947);[4] *Standard Freight Lines, Inc.—Merger*, 40 M. C. C. 41.[5]

These decisions reveal nothing more than that the Commission has been inconsistent in determining whether a merger or similar combination between two subsidiaries of a single parent constitutes an acquisition of control by the immediate parent of the combined subsidiaries, and whether the immediate parent is a necessary party to the proceeding in which approval is sought for the combination. They fail altogether to support defendants' contention that a more remote parent "acquires control" or is a necessary party to such a proceeding.[6] In fact, in the only two cases in which the parent of the merging subsidiaries also had a parent, United Parcel, in which the remote parent was a non-carrier, and Scott Bros., in which the remote parent was a carrier, the Commission failed to find an acquisition of control or a necessity for joinder of the parent's parent. In no case has the Commission seen fit to explain or reconcile its conflicting decisions.

The other cases relied on by defendants to support the claimed uniform administrative interpretation of Section 5(2)(a) and the *Marshall* case involved fact situations which make them inapplicable to the present case.

Thus, where a parent has acquired direct control of a subsidiary by purchase of its stock from an intermediate

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[4] Merger of a subsidiary in the third tier of the holding company hierarchy into a subsidiary in the second tier, thus putting the combined subsidiaries under the direct control of the parent.

[5] The I. C. C. held that Chaddick, an individual, acquired control and was a necessary party to a proceeding for approval of a merger between two subsidiaries, both already controlled by him through stock ownership.

[6] Here Central is the immediate parent of the merging subsidiaries, not Alleghany. Alleghany claims to control Central.

subsidiary, the Commission has uniformly regarded the purchase as an "acquisition of control". *Atchison, T. & S. F. Ry. Co.—Control—Santa Fe Trail Transp.*, 15 M. C. C. 469 (1938); *Warrior & Gulf Nav. Co. Control*, 250 I. C. C. 26 (1941); *Wheeling and L. E. Ry. Co. Lease*, 271 I. C. C. 713, (1949); *Kittrell—Control—Dixie Motor Coach Corp.*, 37 M. C. C. 91 (1941). As vendee, the parent in each of these cases would, of course, be one of the two active participants to the transaction, and a necessary party to the proceeding for approval. Inasmuch as Alleghany has not sought to purchase the stock of any of its subsidiaries, these cases are not applicable.

The Commission has also held that where one company, which controls another to a limited extent, acquires an additional or tighter form of control, it has "acquired control" within the meaning of Section 5(2)(a). *Union Belt Ry. of Oakland Control*, 271 I. C. C. 223 (1948).[7] *Control of Big Four by New York Central*, 72 I. C. C. 96 (1922).[8] But these cases are not applicable here, because Alleghany's control of its subsidiaries is not one bit more complete than it was before the merger.

Defendants apparently do not contend that the application for permission for Central to lease the properties of the Bridge Company, which was also submitted to the Commission, constitutes an acquisition of control by Alleghany. In any event, such a claim would be misplaced. Where there is already complete stock control of the components of a system, their over-all control does not depend upon intra-system leases. And the Commission has not

[7] Southern Pacific sought I. C. C. approval to acquire control of Union Belt by purchasing its stock, although it already controlled its properties by lease.

[8] New York Central, already owning a majority of the common stock, sought permission under Section 5(2) to acquire preferred stock in the Big Four. Consent of the majority of the preferred was required for certain transactions, and the Commission therefore regarded the acquisition of the preferred stock as an acquisition of control.

expressed any support for such a claim. In *Nicholas, Fayette & Greenbrier R. Co. Lease,* 261 I. C. C. 546 (1945), it held that parents acquire control as a result of the joint lease of property of a jointly owned subsidiary.[9] This holding, whether defensible or not in cases of subsidiaries held by more than one carrier, as to which a lease could work a shift of power between the two holding companies, has no applicability to the present case which only involves wholly owned subsidiaries of a single holding company. In *Industrial Transport, Inc.—Lease, Jenks,* 39 M. C. C. 823 (1944), the only case of a lease within such a wholly owned system, the Commission held that a parent who leased his own properties to one of his subsidiaries did not, through the subsidiary, acquire control of what he already owned.

The remaining cases cited by defendants have no apparent relation to the facts of the present case. *Control of Central Pacific by Southern Pacific,* 76 I. C. C. 508 (1923).[10] *Carey & Beveridge—Control—Commercial Carriers, Inc.,* 45 M. C. C. 165 (1946).[11] *Genesee Falls Ry. Co Control,* 212 I. C. C. 637 (1936).[12]

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[9] The I. C. C. held that Alleghany, as the parent of C. & O. was a necessary party to an application by C. & O. and New York Central to lease an extension of the Greenbrier, a carrier which C. & O. and Central already controlled by stock ownership.

[10] The I. C. C. granted Southern Pacific authorization to acquire control by lease and stock ownership of Central Pacific, even though it already had such control. The Supreme Court, however, had just found its control in violation of the anti-trust laws, and ordered divestiture. Southern Pacific therefore sought to acquire lawful control by I. C. C. approval which would exempt it from the provisions of the anti-trust laws.

[11] Previously, Carey, Beveridge and one Travers had owned two carriers. Carey and Beveridge acquired Travers' interests in both. In effect the Commission held there was an acquisition of control by Carey and Beveridge which had not previously existed and which required I. C. C. approval under Section 5(2).

[12] New York Central applied for I. C. C. authorization to acquire 100% of the stock of Genesee Falls Ry. and to merge that corporation into Central. Central already owned "about half" of Gen-

Finally, defendants' contention, that an order under Section 5(3) may be entered by the I. C. C., when it has found an "acquisition of control" as a result of an alteration in the form of control, is unsupported. No court has so held. Neither has the I. C. C., although in two cases the Commission assumed it had such power without attempting to exercise it. In *Warrior & Gulf Nav. Co.—Control, supra,* it declined to enter such an order as a matter of discretion; *and in Nicholas, Fayette & Greenbrier R. Co. Lease, supra,* it declined because Alleghany was already considered a carrier under an order entered in a prior case. In *Chesapeake & O. Ry. Co. Purchase, supra,* also relied on by defendants, the I. C. C. did not appear to base its application of Section 5(3) to Alleghany on the latter's application for approval of the purchase of the property of Norfolk Terminal, its already held subsidiary. Rather, the applicability of Section 5(3) was based upon retroactive approval of Alleghany's acquisition of control of the C. & O., Nickel Plate and Pere Marquette.

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esee's stock. The balance, which was substantially valueless, was owned by several of its customers. The I. C. C. approved the merger and authorized the acquisition of control of Genesee by Central by acquisition of all its capital stock. There was no finding that Central's ownership of stock before the proposed transaction had enabled it to control Genesee.

Appendix II.

The opinion on the application for a preliminary injunction departed too far from reality in taking the position that the application to the ICC implied a request that it pass on the propriety of Alleghany's control of the Central. We believe that the ICC had no appropriate application before it for a determination of the question of control. The case cannot, therefore, be remanded for such a determination.

If we are wrong, however, in this holding that the ICC is without jurisdiction, the case should be remanded for the determination of (1) whether Alleghany does control Central and (2) whether such control is in the public interest.

The ICC's orders purported to determine the question of control of Central but that determination cannot stand (a) because the findings as to Alleghany's control of Central are insufficient, (b) because the evidence does not support those findings, and (c) because plaintiffs were deprived of an evidentiary hearing on that issue of control. We have little to add to the treatment of those questions in the opinion on the motion for a preliminary injunction.

1. In additional support of our determination that the opinions of the ICC are defective, in that ultimate facts to support their conclusions are not found therein, we cite, *Baltimore & Ohio R. Co.* v. *U. S.*, 22 F. Supp. 533, 537, (D. C. N. Y.) and *M. & M. Transportation Company* v. *United States*, 128 F. Supp. 296, 298-9 (D. C. Mass.).

2. To our discussion of the failure to give an evidentiary hearing we add the following:

The ICC Rules of Practice (see last volume of 49 U. S. C. A.—i.e., Sec. 301 to end—p. 439 et seq.) contemplate an evidentiary hearing on oral argument, or by deposition, except in a "shortened" or "modified" proceeding. See Rules 5(j) and (k), 44, 44(b), 45(b), 50, and

74. Nothing in the record shows that here the proceeding was "shortened" or "modified" in the manner provided in Rules 44 and 45(b).

Rule 19 provides that "facts in a pleading filed prior to oral hearing should "constitute evidence . . . unless specifically denied in a counter-pleading." If the intervenors "specifically denied" facts alleged in Alleghany's application, they were entitled to a hearing on oral evidence or depositions as to such denied facts. As an example of such a specific denial we note plaintiff Breswick's statement in its amended petition of February 18, 1955, that "Alleghany Corporation is not in control of • • • the New York Central". This specifically denies the statement in Alleghany's application that it "recently • • • acquired control of the Central".

Section 5(2)(b) provides that the Commission "shall afford reasonable opportunity for interested parties to be heard." Section 17(3) provides that all hearings "shall be public upon the request of any party interested." Section 5(2)(b) provides that "if the Commission shall consider it necessary . . . , it shall set aside said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved, unless the Commission determines that a public hearing is not necessary in the public interest." As Alleghany admits (in printed brief) Sec. 17(3) indicates that there may be hearings that are not "public." But Alleghany argues that Sec. 5(2)(b) is an exception to Sec. 17(3), because the former gives the Commission discretion. However, assuming, arguendo, that Sec. 17(3) does not deprive the Commission of discretion under Sec. 5(2)(b)—i.e., discretion not to hold a public hearing even if one is requested by interested parties—it still seems true that there can be a non-public hearing under Sec. 5(2)(b) at which "interested parties" must have a "reasonable opportunity to be heard."

FCC v. *WJR*, 337 U. S. 265, related, not to the presentation of evidence, but solely to the oral argument of legal questions. Moreover, the FCC statute, 47 U. S. C. Sec. 312(b), did not provide for an "opportunity to be heard," but only for "reasonable opportunity to show cause." In addition, even as to oral argument, the Supreme Court (pp. 275-276) noted that, "in some situations," such an oral argument is essential to a fair hearing. A "situation" which involves the very jurisdiction of the Commission would seem to be such a situation.

It is true that plaintiffs were not entitled to an evidentiary hearing if they did not own Alleghany stock when they sought to intervene. However, Breswick & Co. alleged such ownership in their petition for intervention and this was not denied by Alleghany in its answer. We feel that we ought not to go behind the ICC record.

3. The ICC opinions were further defective in their failure to find that the acquisition by Alleghany of control of the Central was consistent with the public interest. It is provided, 49 U. S. C. § 5(2)(b), that the ICC's approval shall be given if it finds that "the proposed transaction • • • will be consistent with the public interest".

The fact that the statute contemplates consideration of a "proposed" transaction does not mean that a consummated, though unauthorized, transaction must be accepted as legitimate. The ICC, when asked to approve a past acquisition made without ICC approval, will deny the retroactive approval except perhaps where the "illegal" past acquisition was made in good faith. See *Bingler* case, 7 Fed. Carriers Cases, No. 31869, p. 605 at 606.

The finding of public interest is of very real importance. It has been held to include the following factors: Adequacy of transportation, economy and efficiency effected by the change, necessity and appropriateness of the change in serving the public need, maintenance of desirable competition, avoidance of hampering restraints. *Schwabacher* v. *United States*, 334 U. S. 182, 193-4; *New York Central*

Securities, 287 U. S. 12, 24-6; *United States* v. *Lowden*, 308 U. S. 225, 230; *Standard Oil* v. *United States*, 337 U. S. 293, 311.

In *Weinstein-Control-Capital Transit & Montgomery Bus Lines*, 56 MCC 127, 134, Division 4, (Mahaffie, Rogers and Patterson) held that the fitness of the person acquiring control, financially and otherwise, was a proper factor for consideration.

Prior violations of the Act were considered in §5(2) applications in *Marcell-Purchase-Flemings*, 39 MCC 5. (This factor has also been taken into account in connection with merger applications.) *Zeffrin Truck Lines, Inc.-Merger*, 37 MCC 33; *Hankenson-Control-Mutual Trucking*, 37 MCC 617.

Public interest would undoubtedly include other factors if the circumstances required. For example the ICC might well conclude that a proposed acquisition by a foreign government was not in the public interest.

We consider sound the authorities cited by Division 4, and in the opinion on the preliminary injunction in support of the holding that such a finding must be made. Alleghany's attempted distinction does not stand up. The two cases on which it relies are *Weinstein-Control-Capital Transit & Montgomery Bus Lines, supra*, and *Seaboard Airline Ry. Co. Receivership*, 261 ICC 689. It is said that the former relates to a motor carrier and motor carriers in order to obtain a certificate of public convenience and necessity under §§306-307 must be found "fit, willing and able properly to perform the service proposed" whereas there is no such requirement in the case of rail carriers. This observation is true but irrelevant. The holding in the *Weinstein* case was in no sense based upon §§306 and 307. The only section under discussion was the same one before us now, §5(2). Similarly, an attempt is made to distinguish the *Seaboard* case because one of its subsidiaries was a water carrier. This fact may be true, but again that was in

no way the basis for the ICC determination and it is not commented on in connection with the holding that acquisition of control of a previously combined system required ICC approval under §5(2).

An additional case supporting the need for this finding is *Arkansas & L. M. Ry. Co. Control*, 282 ICC 254, Division 4, (Mahaffrie, Rogers and Mitchell). In that case a corporation acquired four small rail carriers previously owned directly or indirectly by the selling corporation. Its acquisition was held to require ICC approval (p. 260). Further the individuals who, by a voting trust, controlled the acquiring corporation were also held to be in indirect control of the four carriers and therefore approval of their acquisition was necessary (p. 263).

Appendix B.

First Supplemental Opinion.

[Same Title.]

Before: Frank, Circuit Judge,
and
Dimock and Walsh, District Judges.

In our opinion of November 18, 1955, we neglected to say that the temporary injunction against Alleghany would be made permanent. That is, however, our direction. Nevertheless we must consider how much, if any, of our order should be stayed pending appeal.

The temporary injunction, among other things, enjoined Alleghany, its transfer agents, officers, directors, servants or employees from transferring the new 6% preferred stock. That part of it was stayed by Mr. Justice Harlan, pending appeal, insofar as it related to the 900,000 shares of preferred stock already issued. In deference to him we similarly stay the corresponding part of our final injunction pending appeal.

For obvious reasons we will not stay any of the rest of the injunction against Alleghany, its transfer agents, officers, directors, servants or employees.

We need not, and do not, now consider the legal consequences, if any, of the transfers of new preferred stock which occurred after the issuance, by Justice Harlan, of a partial stay of this Court's preliminary injunction. Should the Supreme Court reverse our final order consideration of that matter will not be necessary; should there be no appeal from our order, or if the Supreme Court should affirm our order, we will, unless the Supreme Court other-

wise directs, consider the matter on the application of the plaintiffs or intervenor-plaintiffs.

At New York, N. Y.
in said district, on
December 23, 1955.

/s/ JEROME N. FRANK,
United States Circuit Judge.

/s/ E. J. DIMOCK,
United States District Judge.

/s/ LAWRENCE E. WALSH,
United States District Judge.

Appendix C.

Second Supplemental Opinion.

[Same Title.]

Before: Frank, Circuit Judge,
and
Dimock and Walsh, District Judges.

In footnote 7a to our opinion of November 18, 1955, to which this is a supplement, we made a statement indicating that Alleghany controlled United States Trucking Company until May 21, 1954. We made this statement out of abundant caution on the strength of information to that effect in a letter from one of the parties. Another of the parties now states that what we said in the footnote was misleading. The statement in our footnote had no effect upon our decision and does not constitute a finding of fact or conclusion of law.

At New York, N. Y. in said district, on January 27, 1956.

/s/ Jerome N. Frank,
United States Circuit Judge.

/s/ E. J. Dimock,
United States District Judge.

/s/ Lawrence E. Walsh,
United States District Judge.

Appendix D.

Memorandum Opinion.

[Same Title.]

Per Curiam

This is a motion by defendant Alleghany Corporation to set aside a judgment and for a new trial upon the strength of evidence newly presented to the court.

The assailed judgment, among other things, set aside (a) orders of the Interstate Commerce Commission insofar as they determined that Alleghany Corporation was in control of The New York Central Railroad and insofar as they determined that Alleghany Corporation should be considered as a carrier subject to the provisions of section 20(1) to (10) inclusive and section 20a(2) to (11) inclusive of the Interstate Commerce Act and (b) orders of the I. C. C. authorizing issuance of 6% convertible preferred stock. As a ground for our conclusion of the invalidity of the determination that Alleghany Corporation should be considered as a carrier, we pointed out that the action of the I. C. C. relied upon as having that effect was the approval of a merger of the Louisville & Jeffersonville Bridge & Railroad Co. into The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, known as "the Big Four". These two carriers were already controlled by the New York Central. In turn Alleghany claimed that it controlled the New York Central. Alleghany was not actually a carrier but sought status as a carrier by virtue of Interstate Commerce Act, §5(3), 49 U. S. C. §5(3), which provides that, whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of the same section to acquire control of a carrier or carriers, "such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier * * *". We held that, since the I. C. C. approved only a merger of carriers already controlled by a single

parent, no acquisition of control was involved and the I. C. C. had no jurisdiction, by virtue of its approval of the merger, to provide that Alleghany should be considered as a carrier.

Since the I. C. C.'s power to authorize the issuance of the preferred stock depended upon the existence of a valid order authorizing Alleghany to acquire control of a carrier or carriers and providing that it be considered as a carrier, we set aside the orders authorizing the issuance of preferred stock.

The matter which Alleghany now, for the first time, presents to us as a basis for setting aside our judgment is an order of the I. C. C. in Boston and Albany Railroad Company, *et al.* Control, Finance Docket 18789, decided March 22, 1955. That proceeding, it is said, involved new acquisition of subsidiaries of the New York Central, rather than mere merger, so that an order authorizing that acquisition might validly have provided that Alleghany should be considered as a carrier. The order actually entered contained no such provision. It was, however, entered prior to the orders authorizing the issuance of the preferred stock so that, as far as chronology is concerned, it might have lent support to the I. C. C.'s power to make those orders of approval.

While the cause of the omission from the Boston and Albany order of a provision that Alleghany should be considered as a carrier may perhaps have been the belief of the I. C. C. that there was a valid outstanding order to that effect in the proceeding here under review, that does not alter the fact that the Boston and Albany order contained no such provision. Without a direction that the noncarrier shall be considered as a carrier, the authorization of the acquisition of a carrier does not create that status. Section 5(3) merely provides that the authorization shall create that status "to the extent provided by the Commission in such order". The plain meaning of the statute that, no matter how eligible may be the controlling corporation, status as a carrier shall be conditioned on a provision to that effect in the order, has been recognized by

the I. C. C. In Warrior & Gulf Nav. Co. Control, 250 I. C. C. 26, the I. C. C. says in so many words, p. 28, that the United States Steel Corporation, by the transaction authorized, "unquestionably will acquire control of the company"; it nevertheless concludes, p. 32, that it will not include any provision that the steel corporation shall be considered as a carrier since it perceives no reason for its regulation under the Interstate Commerce Act.

Thus the Boston and Albany order gave no validity to any of the orders set aside by our judgment. If the judgment was correct in the light of the information before us when it was rendered, it is still correct. The existence of the Boston and Albany order in its present form does not change the legal situation.

We presume that what we are really asked to do is to vacate our judgment and hold proceedings in abeyance while Alleghany applies to the I. C. C. for an amendment of the Boston and Albany order so as to contain a direction that Alleghany shall be considered as a carrier. Even if such an amendment should be obtained nothing would be settled since, for example, difficult questions would arise as to the effect of such an amendment on proceedings taken before its accomplishment.

We are advised that a prompt appeal to the Supreme Court is contemplated and our view is that the ends of justice will be better served by an immediate and authoritative determination of the questions raised in the existing record than by a delayed and doubtful *nunc pro tunc* repair job.

There remains the possibility that Alleghany may wish to take, concurrently with the appeal, proceedings in the Boston and Albany case before the I. C. C. in order to obtain determinations there that Alleghany is in control of New York Central and that that control is in the public interest.

We express no view as to the propriety of such a course. It may be that the Boston and Albany case does not really involve an acquisition of control or that there are other reasons which render the course improper or impracticable.

We do emphasize, however, that if authorization of Alleghany's control of Central is to be considered in connection with the Boston and Albany case that proceeding must be so conducted that this issue is not subordinated. This means that applications to intervene, pleadings, testimony, and findings with respect to this issue must receive the same full consideration which would be given if it were the sole application before the Commission.

Alleghany moves in the alternative that the judgment be amended so as to lift the prohibition therein contained against the carrying out of the offer to exchange the new preferred stock. We see no reason for modifying the decision which we reached after careful consideration of all of the arguments now advanced.

Both motions denied.

Dated: January 27, 1956

/s/ JEROME N. FRANK,
U. S. C. J.

/s/ E. J. DIMOCK,
U. S. D. J.

/s/ LAWRENCE E. WALSH,
U. S. D. J.

Appendix E.

Memorandum Opinion.

[Same Title.]

Per Curiam

Defendants Baker, Weeks & Co. *et al.*, have moved for reargument of this case.

Only one of the points raised in the elaborate brief submitted in support of the motion requires comment. In that case the earnestness with which defendants' position is advanced leads us to take note of it. It is said that New York Central Securities Corp. *v.* United States, D. C. S. D. N. Y., 54 F. 2d 122, affd. 287 U. S. 12, stands for the proposition that where a parent corporation which has theretofore controlled a subsidiary by virtue of stock ownership modifies that form of control by entering into a lease of the properties of the subsidiary, the transaction constitutes an acquisition of control within the terms of Interstate Commerce Act §5(3), 49 U. S. C. §5(3). Suffice it to say that in the New York Central Securities case the court dealt with Section 5(2) of the Transportation Act of 1920, 49 U. S. C. §5(2), which did not distinguish between transactions which did and did not constitute acquisitions of control.

The statute here involved, Interstate Commerce Act, §5(2), 49 U. S. C. §5(2), draws just that distinction and classifies transactions between those which are mere mergers, leases, etc. and those which involve the acquisition of control. It is only those transactions which involve the acquisition of control which may form the basis for an

order under Section 5(3) that a person not a carrier shall be considered as a carrier.

The motion for reargument is denied.

Dated: January 27, 1956

/s/ JEROME N. FRANK,
U. S. C. J.

/s/ E. J. DIMOCK,
U. S. D. J.

/s/ LAWRENCE E. WALSH,
U. S. D. J.

Appendix F.

Final Judgment.

[Same Title.]

Before: Frank, Circuit Judge,
and
Dimock and Walsh, District Judges.

This action, to enjoin and set aside certain orders of the Interstate Commerce Commission and to enjoin Alleghany Corporation, having come on for final hearing on September 14 and 15, 1955, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleading and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises, and having on November 18, 1955, filed herein its opinion, containing its findings of fact and conclusions of law; now, in accordance with the said opinion and its supplemental opinion of December 23, 1955, findings, and conclusions, it is

Ordered, adjudged and decreed that the orders of the Interstate Commerce Commission, dated March 2, 1955 and May 24, 1955, entered in Finance Docket Nos. 14692 and 18656, be and they hereby are enjoined, set aside, annulled and voided except insofar as they approved and authorized the merger of the properties and franchises of the Louisville and Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, for ownership, management and operation, and through ownership of the stock of the latter company, control of the said properties and franchises by the New York Central Railroad Company, and the inclusion of the properties and franchises of the Louisville and Jeffersonville Bridge & Railroad Company by modification under

the lease of January 2, 1930, between the New York Central Railroad Company and the Cleveland, Cincinnati, Chicago and St. Louis Railway Company respecting operation of the properties of the latter; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the orders of the Interstate Commerce Commission, dated May 26, 1955 and June 22, 1955, entered in Finance Docket No. 18866, authorizing Alleghany Corporation to issue (a) not exceeding 1,367,440 shares of 6% convertible preferred stock, par value $10 per share, to be offered to the holders of its cumulative 5½% preferred stock, Series A, par value $100 a share, in exchange, on the basis of 10 shares of 6% convertible preferred stock for each share of cumulative 5½% preferred stock, Series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1.00 a share, upon conversion of such 6% convertible preferred stock on the basis set forth in the application of Alleghany Corporation and the report of the Interstate Commerce Commission, be and they hereby are enjoined, set aside, annulled and suspended; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that Alleghany Corporation, its transfer agents, officers, directors, servants and employees, be and are hereby enjoined from taking any steps in connection with or in furtherance of the issuance of said 6% convertible preferred stock in exchange for said 5½% preferred stock, or for any other purpose, or the transfer thereof; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the enforcement of this judgment and the injunctions issued herein, subject to the exception stated in the next paragraph, is hereby suspended for a period of 30 days from the date hereof to permit any defendant or defendants in this action to file notice of appeal to the Supreme Court of the United States from this judgment and the injunctions contained herein, and upon filing of said notice of appeal by any defendant in this action, the enforcement of this judgment and the injunctions contained herein shall be further sus-

pended until the issuance of a mandate from the Supreme Court of the United States; and it is

FURTHER ORDERED, ADJUDGED AND DECREED that the stay pending appeal provided by the foregoing paragraph, except to the extent provided in the next paragraph, shall not apply to so much of said judgment and injunctions as is directed to Alleghany, its transfer agents, officers, directors, servants or employees, and it is

FURTHER ORDERED, ADJUDGED AND DECREED that, despite the provisions of the last preceding paragraph, the stay provided by the paragraph last but one shall apply to said judgment and injunctions to the extent that they enjoin Alleghany, its transfer agents, officers, directors, servants or employees from transferring the 900,000 shares of 6% convertible preferred stock issued prior to the stay granted by Mr. Justice Harlan.

At New York, N. Y. in said district, on December 23, 1955.

/s/ JEROME N. FRANK,
United States Circuit Judge.

/s/ E. J. DIMOCK,
United States District Judge.

/s/ LAWRENCE E. WALSH,
United States District Judge.

Appendix G.

Order Extending Stay.

[Same Title.]

Whereas, final judgment in this cause was made and entered December 23, 1955, and in part provided a 30-day stay with respect to certain injunctive provisions contained in said final judgment, and which said 30-day stay was further extended by said final judgment until the issuance of a mandate by the Supreme Court of the United States, provided any defendant or defendants filed a notice of appeal to the Supreme Court of the United States within said 30 days of the entry of said final judgment; and

Whereas, intervening defendant, Alleghany Corporation, made application requesting the Court to reconsider and amend its judgment of December 23, 1955, or in the alternative to grant a new trial, and for other relief; and

Whereas, other intervening defendants made a similar application; and

Whereas, the Court has not indicated whether it will entertain such applications, or either of them, and whether it will hear the parties thereon, and has as yet made no disposition of such applications; and

Whereas, the above mentioned 30-day stay from the date of entry of final judgment will expire on or about January 21, 1956.

Now, therefore, it is

Ordered, that the 30-day stay and suspension of injunctive provisions contained in said final judgment of December 23, 1955, be and it hereby is extended to and including ten (10) days after the entry of an order determining the applications above mentioned of Alleghany Corporation and of Baker, Weeks & Co., Oscar Gruss & Son, Irving Newman as Trustee under a deed of trust dated November 6,

1943, and Edward Gornish; and the filing of a notice of appeal by any defendant within said period as extended shall have the same force and effect with respect to the enforcement of the judgment and injunctions contained therein as though said notice of appeal had been filed within 30 days from the entry of said final judgment.

Dated: New York, New York,
January 19, 1956.

.....

U. S. C. J.

/s/ E. J. DIMOCK
U. S. D. J.

/s/ LAWRENCE E. WALSH
U. S. D. J.

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Office - Supreme Court, U. S.
FILED
FEB 15 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. ~~692~~ 36

ALLEGHANY CORPORATION,
Appellant,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

SEPARATE APPENDIX TO STATEMENT AS TO JURISDICTION CONTAINING RELEVANT OPINIONS, REPORTS AND ORDERS.

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Document 1.

Opinion.

No. 275

United States District Court

SOUTHERN DISTRICT OF NEW YORK.

BRESWICK & Co. and RANDOLPH PHILLIPS, as common stockholders of Alleghany Corporation,

Plaintiffs,

against

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, THE NEW YORK CENTRAL RAILROAD COMPANY and JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership doing business under the firm name and style of GRUSS & Co. and SAMUEL A. MEHLMAN,

Defendants.

Civ. 101-114.

Before:

HINCKS, C. J. and DIMOCK and WALSH, D. JJ.

Appearances:

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STANLEY N. BARNES, Esq., Assistant Attorney General; Hon. J. EDWARD LUMBARD, United States Attorney; ALBERT PARKER, Esq.; JAMES H. DURKIN, Esq., Special Assistants to the Attorney General, Attorneys for Defendant United States of America.

SAMUEL R. HOWELL, Esq., Acting General Counsel; LEO H. POU, Esq., Associate General Counsel, Attorneys for Defendant Interstate Commerce Commission.

WHITE & CASE, Esqs., 14 Wall Street, New York 5, N. Y.

and

WHEELER & WHEELER, Esqs., 704 Southern Building, Washington, D. C., Attorneys for Defendant Alleghany Corporation,

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HAROLD H. MCLEAN, Esq., EDWARD K. WHEELER, Esq., Attorneys for Defendant, The New York Central Railroad Company, 466 Lexington Avenue, New York 17, N. Y.

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SAMUEL A. MEHLMAN, Esq., Defendant *pro se*, 165 Broadway, New York, N. Y.

DIMOCK, D. J.

This action was originally brought for an injunction requiring the Interstate Commerce Commission to set aside two of its orders to the extent that they granted the application of Alleghany Corporation to be "considered as a carrier" subject to the provisions of sections 20(1) to (10) inclusive and sections 20a(2) to (11) inclusive of the

Interstate Commerce Act, 49 U. S. C. §§20(1)-(10) inclusive, 20a(2)-(11) inclusive.

By supplemental complaint and stipulation the scope of the action has since been extended so as to include a prayer for an injunction against the enforcement of two orders of the I. C. C. approving a proposed exchange of preferred stock of Alleghany.

The matter now before this court is an application for an interlocutory injunction vacating the said orders that Alleghany be considered as a carrier and enjoining the enforcement of the two orders dealing with the preferred stock.

On September 17, 1954, Alleghany, The New York Central Railroad Company and two subsidiaries of the New York Central, Louisville & Jeffersonville Bridge & Railroad Co. and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, known as "the Big Four", filed with the I. C. C. an application pursuant to section 5(2) of the Interstate Commerce Act, 49 U. S. C. §5(2). On its face, the principal object of the application was to obtain approval for a merger of the Bridge Company into the Big Four. The substantial effect of the granting of the application, however, would have been, as claimed by Alleghany, to constitute Alleghany, pursuant to the provisions of section 5(3), a non-carrier "considered as a carrier" subject to the above-designated provisions of the Interstate Commerce Act for the purpose of the issuance of securities, etc. It is agreed on all hands that, except for the effect of such an order that Alleghany should be "considered as a carrier", it would be an investment company subject to the provisions of the Investment Company Act, 15 U. S. C. §80a-1 et seq., for the purposes of the issuance of securities, etc. Thus, according to Alleghany's theory, the granting of the application constitutes a determination that Alleghany in issuing securities is subject to supervision of the I. C. C. rather than the Securities and Exchange Commission. The immediate importance of this is in connection with the issuance of a new class of preferred stock pursuant to a voluntary exchange offer

authorized by the Alleghany directors, made public on February 2, 1955 and approved by the I. C. C. in the orders under review but not by the S. E. C.

Alleghany filed with the I. C. C. its application for leave to issue the new class of preferred stock on February 18, 1955.

On March 2, 1955, the I. C. C., through its Division 4, approved the merger application and, on May 24, 1955, the I. C. C. through the whole Commission, affirmed this approval. These two orders of approval are the ones now being reviewed by this court and which were included in the original complaint. Since their effect was the same they will usually be referred to herein in the singular.

On May 26, 1955, two days after the order of the full Commission approving the merger, Division 4 of the I. C. C. approved the issuance of the preferred stock.

On June 6, 1955, the complaint in this action was filed and, on June 15, 1955, plaintiffs made this application seeking a preliminary injunction against enforcement of the jurisdiction assuming orders. Attack on the preferred stock order was postponed prior to the action of the full Commission on the theory that review would be premature.

On June 22, 1955, the entire Commission affirmed the preferred stock order of Division 4. These two preferred stock orders are also now being reviewed by this court but they were added by supplemental complaint. Like the jurisdiction assuming orders they will usually be referred to in the singular.

On June 23, 1955, Alleghany, immediately upon learning of the full Commission's order finally approving the issuance of the preferred stock, began distribution of the new stock pursuant to the exchange offer. That distribution was halted by a temporary restraining order issued by this court but not before more than half of the proposed issue had been exchanged. The effect of that temporary restraining order has been to prevent the transfer of the shares of new preferred stock and consequently to halt trading therein on the New York Stock Exchange. We are advised that, before trading was actually stopped, there had been sales amounting to 2400 shares of stock.

Since the institution of the proceeding, The New York Central Railroad, Alleghany and two holders of Alleghany preferred stock, Gruss & Co., a copartnership, and Samuel A. Mehlman, have been granted leave to intervene as defendants.

As above indicated, Alleghany's theory is that, as a result of the determination of the merger application, Alleghany obtained the status of a non-carrier deemed to be a carrier for the purpose of coming under the supervision of the I. C. C. for matters relating to the issuance of securities, as distinguished from the status of an investment company coming under the supervision of the S. E. C. for such matters.

The statutory provisions involved are the following:

Interstate Commerce Act, §5, 49 U. S. C. §5.

"*(2) Unifications, mergers, and acquisitions of control.*

(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this section—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; * * *."

"(3) *Non-carrier deemed carrier upon acquiring control.*

Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control: Sections 20(1)-(10), 304(a) (1) and (2), 320 and 913 of this title, (which relate to reports, accounts, and so forth, of carriers), and sections 20a(2)-(11), and 314 of this title, (which relate to issues of securities and assumptions of liability of carriers), including in each case the penalties applicable in the case of violations of such provisions."

At the threshold defendants make two objections: first, that the jurisdiction assuming order is not reviewable and second, that, even if it is reviewable, plaintiff has no standing to review it.

REVIEWABILITY OF THE ORDERS.

Shannahan *v.* United States, 303 U. S. 596, is said to be authority against the reviewability of the jurisdiction assuming order. The determination there held to be unreviewable was a finding that the carrier concerned was not an interurban railroad and was therefore subject to certain provisions as to labor dispute mediation.

The Supreme Court in Rochester Tel. Corp. *v.* U. S., 307 U. S. 125, seemed to disagree with the Shannahan decision on the facts but Justice Frankfurter, at page 131, explained its principle by quoting the statement of Justice Brandeis in United States *v.* Los Angeles R. R., 273 U. S. 299, 310, to the effect that there can be no review of an order "which does not change the carrier's existing or future status".

Here the status of Alleghany, absent an order of the I. C. C. under sections 5(2) and 5(3) that it should be considered as a carrier subject to the Interstate Commerce Act, was that of an investment company subject to the provisions of the Investment Company Act. The orders sought to be reviewed changed its "existing or future status". Hence the quoted principle of the Shannahan case does not prevent their review.

Justice Frankfurter in the Rochester case, besides quoting from Justice Brandeis, stated the rule for himself as follows, p. 132, "Where a complainant seeks the Commission's authority under the terms of a statute and the Commission's action is followed by legal consequences * * * or where the Commission's order denies an exemption from the terms of the statute * * * the road to the courts' jurisdiction seems to be clear."

Here the I. C. C. granted an exemption from the terms of the Investment Company Act. That act, by section 3(c)(9), 15 U. S. C. §80a-3(c)(9), excepts from the "investment company" class, "[a]ny company subject to regulation under the Interstate Commerce Act". Section 5(3) of the Interstate Commerce Act, under which the I. C. C. acted in making the order here, provides that the noncarrier shall, "to the extent provided by the Commission in such order", be considered as a carrier subject to the enumerated provisions of the Interstate Commerce Act. By making Alleghany subject to the Interstate Commerce Act, the I. C. C. exempted it from the Investment Company Act and thereby brought the order within the test for reviewability laid down in the Rochester case.

There is no room here for any idea that might be generated by the Shannahan case that an attempt to review the jurisdiction assuming orders is premature. The jurisdiction has been exercised by the adoption of the order approving the issue of the preferred stock.

Defendants intimate that the order approving the issue of preferred stock is permissive only and that it is therefore unreviewable, citing a statement in Miller *v.* United States, D. C. S. D. N. Y., 277 F. 95, that an order of the

I. C. C. approving the issuance of securities does not direct the issuance but only puts the carrier in a position where, if the securities are issued they will be valid.* If this statement were intended to lay down a rule that permissive orders of the I. C. C. may not be reviewed, the law has since been settled to the contrary. In New York Central Securities Corp. *v.* United States, D. C. S. D. N. Y., 54 F. 2d 122, aff'd. 287 U. S. 12, a stockholder was allowed to review an order of the I. C. C. which authorized, but did not direct, action by the corporation. Accord: Chicago Junction Case, 264 U. S. 258, 263.

PLAINTIFFS' STANDING TO REVIEW THE ORDERS AND "IRREPARABLE DAMAGE".

The Investment Company Act, Aug. 22, 1940, c. 686, Title I, §§1-53, 54 Stat. 789, tit. 15 U. S. C. §§80a-1 to 80a-52, begins with legislative findings and a declaration of policy. Section 1(b) declares that the "interest of investors" is "adversely affected * * * when investment companies are * * * operated [or] managed * * * in the interest of directors, officers, investment advisors, depositors, or other affiliated persons thereof". That section ends with a declaration "that the policy and purposes of this subchapter * * * are to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors."

One of the purposes of the Investment Company Act is thus to protect investors in investment companies against the managing of those companies in the interests of persons other than the investors.

The complaint here charges in substance that one Robert R. Young and one Allan P. Kirby are in control of Alleghany and have been conducting Alleghany's affairs

* It is to be noted that the question at issue in that case was whether the section regulating approval of securities had been complied with. Here the question is not merely one of compliance with section 20a but whether any order of the I. C. C., under that section or any other, may stand upon its conclusion that Alleghany is to be deemed a carrier under section 5.

primarily in the interest of themselves and a small group of insiders and secondarily in the interest of the other stockholders. It further charges that the application for the orders under review was made at the instance of Young and Kirby for the purpose of escaping the provisions of the Investment Company Act.

The stockholders here allege that, by obtaining an erroneous ruling from the I. C. C., persons in control of the corporation have succeeded in escaping the provisions of an act passed for the express purpose of protecting stockholders from persons in control. Since the corporation, by hypothesis, is helpless, plaintiffs say that they have standing to sue to prevent the thwarting of the declared will of Congress. We are convinced that a stockholder, who seeks only that which Congress has provided for him as matter of right, need not show money damage to entitle him to sue. It is enough if he shows that no one else will act on his behalf. Here the corporation, which is controlled by those he is attacking and which has sought the ruling to which he objects, will not help him. While it would perhaps be too much to expect of the S. E. C. to engage in a jurisdictional right with another great administrative body of coordinate standing, the hard fact is that it has limited its participation to a request to the I. C. C. to surrender part of its jurisdiction as a matter of grace. Moreover no such remedy via the S. E. C. is provided by statute. See Goldstein *v.* Groesbeck, 2 Cir., 142 F. 2d 422.

A plenary action by the stockholders against Alleghany to enjoin the issuance of the preferred stock while the orders of the I. C. C. stand in full force and effect would quite properly be met with the defense that they were collaterally attacking an administrative body's determination.* The present proceeding, where the I. C. C.'s orders

* Alleghany did in fact take this position in successfully opposing a preliminary injunction in *Breswick & Co.* v. *Briggs*, D. C. S. D. N. Y., 130 F. Supp. 953. It there argued that the I. C. C. determination, if subject to attack by plaintiffs, could only be attacked in a proceeding before a three-judge court to enjoin its enforcement and not collaterally in a stockholders' derivative action against the directors of Alleghany.

are directly attacked and where as a party it may be heard in their behalf, affords fair play to both sides.

Where the question is that of unlawful usurpation of regulatory control as distinguished from the reasonableness of regulatory action by an agency with conceded jurisdiction, a stockholder has standing to attack an administrative order in which the corporate management has acquiesced even though he cannot show an interest other than a derivative one on behalf of the corporation. See Ashwander *v.* Valley Authority, 297 U. S. 288. There relief was accorded to stockholders against a "breach of duty [which consists] in yielding, without appropriate resistance, to governmental demands which are without warrant of law or are in violation of constitutional restrictions" (p. 319) even when the stockholders sued "in the right of" (p. 318) the corporation.

Yet, even if we applied the narrower test as to standing to sue applied where a stockholder challenges the reasonableness of the I. C. C.'s regulation rather than its jurisdiction to regulate at all, plaintiffs have sufficient interest apart from the corporation to give them standing to sue. Indeed what they claim here is a right to protection as stockholders against management regardless of the effect of that protection upon the welfare of the corporation. That which they seek is the right of a stockholder not the right of a corporation.

Stockholders were accorded standing to sue under the Urgent Deficiencies Act to review action of the I. C. C. under section 5(2) in New York Central Securities Corp. *v.* United States, 54 F. 2d 122, *supra*. In that case plaintiff held stock of two kinds: stock of a lessee corporation and stock of lessor corporations. The plan of acquisition involved payment of rent by the lessee corporation to stockholders of the lessor corporations in lieu of dividends. The court held that, as stockholder of a lessee corporation, plaintiff had no standing because "plaintiff cannot have sustained any injury in this respect other than indirectly through the lessee corporation." 54 F. 2d 125. "As a minority stockholder of lessor corporations, however, its alleged injury is not merely derivative through its ownership of stock, but

is an independent injury to itself as a member of the class created by the leasing agreements between lessors and lessee." 54 F. 2d 126.

In Schwabacher *v.* United States, 334 U. S. 182, stockholders were permitted to review the I. C. C.'s treatment of their class of stock in a merger plan under section 5(2).

The principle was expressed by Brandeis, J., in Pittsburgh & W. Va. Ry. *v.* U. S., 281 U. S. 479, 487, where he said "Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder, is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or lawsuit of his corporation."

The complaint of plaintiffs is that the I. C. C. unlawfully extended the management's power to adjust their relations with other security holders. Except for the allegedly unlawful act of the I. C. C. the preferences and privileges of plaintiffs would have been protected by the Investment Company Act against the manipulation of those in control of the corporation.*.

The situation is precisely the same as that in the New York Central Securities case, abstracted above, where the stockholder's standing was upheld. The suing stockholder was complaining not because it was to receive rentals but because the corporation was not to receive them. That wrong the stockholders suffered in common with all other stockholders yet the court held that the injury was "not merely derivative * * *, but * * * independent." 54 F. 2d 126. In a literal sense nothing could be more derivative than the loss that the stockholder suffered when the I. C. C. permitted the corporation to renounce the right to rent

* The I. C. C. control with respect to the issuance of securities is merely to protect against over-issue, not to hold the balance between management and investor. See *Miller* v. *United States*, D. C. S. D. N. Y., 277 F. 95, *supra*. *Cf.* Investment Company Act §§1-23, 15 U. S. C. §§80a-1 to 23.

but, in effect, the action of the I. C. C. deprived the stock holders of an independent right to dividends earned by the property of the corporation. So here, it is the whole Alleghany corporation which the I. C. C. has made subject to the Interstate Commerce Act instead of the Investment Company Act but the effect of the action of the I. C. C. is to deprive the stockholders of an independent right not to have their status changed except as permitted by the terms of the Investment Company Act.

Any construction that would identify the interests of these plaintiffs and the corporation would render nugatory the Investment Company Act as an accomplishment of its declared purpose to eliminate the condition that exists when "investment companies" "fail to protect the preferences and privileges of the holders of their outstanding securities." 15 U. S. C. §80a-1(b)(3).

In none of the cases cited by counsel in support of the argument that plaintiffs have no standing did the plaintiffs have such a direct interest in the question as the suitors here. In Pittsburgh & W. Va. Ry. *v.* U. S., 281 U. S. 479, *supra,* the plaintiff minority stockholder sought to attack an order permitting the abandonment of a railroad station. In Sprunt & Son *v.* United States, 281 U. S. 249, and Edward Hines Trustees *v.* U. S., 263 U. S. 143, the plaintiffs were shippers who complained that rates, not attacked as unreasonable, worsened their competitive positions. Merchant Truckmen's Bureau *v.* United States, D. C. S. D. N. Y., 16 F. Supp. 998, was a similar case where the plaintiff did not even have the qualification of being a shipper. In Moffat Tunnel League *v.* U. S., 289 U. S. 113, the Supreme Court characterized the plaintiff's interest as "no more than a sentiment". In Miller *v.* United States, 277 F. 95, *supra,* the plaintiff alleged that he was a stockholder in a railroad whose properties were in process of foreclosure. He was said to be without standing to review an order of the I. C. C. approving issuance of securities of a new corporation for the properties of the old.

It is said that plaintiffs do not show that "legal injury" which is necessary to give plaintiffs standing. We believe

that they show legal injury when they demonstrate that, because of an erroneous ruling by the I. C. C. as to their status, they are subject to possible injury from which they would otherwise be protected. The order under review has exempted the management from the restrictions of the Investment Company Act.

The Investment Company Act was adopted for the protection of investors. Congress has declared that an investor in an investment company shall have the protection of the act and the protection of the S. E. C. It is no answer to tell plaintiffs that they may come out better under the liberal Interstate Commerce Act than under the strict Investment Company Act. The law forbids the management to subject the investor to that hazard.

Of course it cannot be gainsaid that plaintiffs cannot demonstrate that over the years they would fare better as stockholders if Alleghany had to operate under the Investment Company Act rather than the Interstate Commerce Act. That is immaterial, however. The stockholder in the New York Central Securities case, 54 F. 2d 122, *supra*, was permitted to raise many points other than its point that the rental was inadequate.

The rule that a plaintiff, to entitle himself to an injunction, must show irreparable damage has no bearing on plaintiffs' right to maintain this action. All that it means is that they cannot have an injunction if they have an adequate remedy at law.* If plaintiffs have, as we think, this right to invoke the protection of the Investment Company Act against an unlawful assumption of jurisdiction by the I. C. C., they have no adequate remedy at law to vindicate that right.

Plaintiffs' right to a preliminary injunction is a different matter.

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* Kerr on Injunctions, 3rd Ed. Chap. III, §1, p. 14; Charles C. Wilson & Son *v.* Harrisburg, 107 Me. 207, 218, 77 A. 787; Smith *v.* Shiebeck, 180 Md. 412, 24 A. 2d 795; Hodge *v.* Giese, 43 N. J. Eq. 742, 11 A. 484, 487; Columbia College of Music Etc. *v.* Tunberg, 64 Wash. 19, 116 P. 280, 282; Miles Laboratories *v.* Seignious, D. C. E. D. S. C., 30 F. Supp. 549.

To support a preliminary injunction in an injunction suit the plaintiff must show not only that any other remedy than a final injunction would be inadequate but also that an injunction issued after the time involved in waiting for trial would be inadequate protection. Here, unless the issuance of the proposed preferred stock is enjoined it will be issued and in many cases reach the hands of bona fide purchasers so that an unscrambling, in the event of a determination that the I. C. C. approval was unlawful, would be a practical impossibility. Plaintiffs would then find themselves in the position of common stockholders faced with the possibility of dilution of their interest by conversion of this new preferred stock and yet be remediless in spite of the adjudged illegality of the preferred stock. There can be no doubt that without a preliminary injunction the new preferred stock will be issued since distribution had already begun when halted by the temporary restraining order in this case.

THE CLAIM THAT ALLEGHANY MUST BE CONSIDERED AS A CARRIER IRRESPECTIVE OF THE ORDER UNDER REVIEW.

Defendants make the further point that plaintiffs were not harmed by the determination of the I. C. C. because Alleghany already had the status of being "considered as a carrier".

That claim is based on the fact that, by an order dated June 5, 1945, in Finance Docket No. 14692, Alleghany was given that status. Chesapeake & O. Ry. Co. Purchase, 261 I. C. C. 239. That order was made in a proceeding begun by the C. & O. September 2, 1944, under section 5(2) of the act, for the acquisition of the Norfolk Terminal and Transportation Company. On September 5, Alleghany filed a supplemental application, joining the C. & O.'s application and "seeking approval and authorization under §5(3) of the act of control by it, through the C. & O., of the properties of the Terminal Company", and asked approval of the continuance of Alleghany's relationship with the carriers controlled by it, directly or indirectly, including the C. & O., the Nickel Plate and the Pere Marquette.

In making the order of June 5, 1945, the I. C. C. made, among others, the finding, p. 261, that "acquisition by Alleghany Corporation of control, through ownership of stock as above described, of Chesapeake & Ohio, Nickel Plate, Pere Marquette and their subsidiaries and affiliates, is a transaction within the scope of section 5(2) of the Interstate Commerce Act * * *" and provided in the order that "unless and until otherwise ordered by this Commission said Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20(1) to (10), inclusive, and Section 20a(2) to (11) inclusive, of the Interstate Commerce Act".

On January 19, 1954, Alleghany divested itself of the C. & O. stock that it had theretofore held. The Nickel Plate stock had been earlier sold and the Pere Marquette merged with the C. & O. Upon the suggestion of those facts the I. C. C. requested Alleghany to show cause why the order of June 5, 1945, in Finance Docket No. 14692, should not be vacated and set aside insofar as it applied to and provided that Alleghany should be "considered as a carrier". Alleghany responded that it would be ready at a proper time to accept an order terminating its control of the C. & O. and requested that action regarding its status be withheld until the proceedings resulting in the order below could be begun. The I. C. C. allowed Alleghany a period of sixty days for that purpose and the proceedings under review were begun before its expiration.

In the proceedings under review the application alleged that Alleghany had "recently" relinquished control of the C. & O. By the orders under review, the effective portions of the order of June 5, 1945, were expressly terminated and declared to be of no further force or effect.

Whatever might have been the terms of the order of June 5, 1945, they could not have conferred upon Alleghany qualifications to be "considered as a carrier" which it did not possess. From the instant of Alleghany's relinquishment of control of the C. & O. and the Nickel Plate, plaintiffs here were entitled to the special protection which Congress has provided for stockholders in investment com-

panies which do not control railroads. Although failure to apply for vacation of the order might estop Alleghany, it could not shield it from the S. E. C. and it would not be binding upon such third persons as stockholders of Alleghany. As to all except Alleghany, which had accepted the 1945 order as it read, its provision for regulation by the I. C. C. after the factual basis for I. C. C. jurisdiction ceased, was empty fiat.

Even if the order of June 5, 1945, were effective until terminated, the object of the proceedings below was to substitute control of the New York Central for control of the C. & O. and the Nickel Plate as a basis for declaration of status to be "considered as a carrier". Plaintiffs were entitled to be heard on Alleghany's qualification for that status upon the new basis. Carriers are not interchangeable at will.

Failure to Find that Alleghany's Control of the New York Central is "Consistent with the Public Interest."

A fundamental question presented is whether the I. C. C. was empowered by section 5(3) to direct that Alleghany should be "considered as a carrier" even though Alleghany, in applying for consideration as a carrier, did not seek authority to acquire control of a carrier.

To us it seems that the I. C. C. had no such power. It will be noted that section 5(2) empowers the I. C. C. to authorize transactions of two classes: First, transactions involving carriers alone and, second, transactions where persons which are not carriers are involved in relations with carriers. "[A] person which is not a carrier" may be authorized "to acquire control of two or more carriers through ownership of their stock or otherwise" and "a person which is not a carrier and which has control of one or more carriers" may be authorized "to acquire control of another carrier through ownership of its stock or otherwise".

When we come to section 5(3), we find that "a person which is not a carrier" may be "considered as a carrier"

only when it is authorized by an order under paragraph (2) "to acquire control of any carrier or of two or more carriers".

The jurisdiction assuming order in this case did not authorize Alleghany to acquire control of any carrier or of two or more carriers. What it did was to permit a merger of two carriers which were already controlled by a parent carrier, the New York Central, which is said to be controlled by a non-carrier, Alleghany. The case certainly does not fall within the language of the statute in the ordinary acceptance of words.

The effect of the Commission's position is that whenever a holding company in the position of Alleghany deems it desirable to bring itself within the class "considered as a carrier" it needs only to join with its subsidiaries in applying to the I. C. C. for approval of some transaction such as the merger of a railroad bridge company into one of the subsidiary railroad companies. Such a transaction, as, indeed, the transaction here, is completely without significance so far as concerns the question whether the issuance of securities of the top corporation is subject to the jurisdiction of the I. C. C. or the S. E. C. The prayer for approval of the merger is treated as if it were an effective but meaningless incantation to propitiate a medicine man.

Alleghany and the Commission contend that by administrative interpretation such an intra-system merger subjects the non-carrier parent to I. C. C. regulation pursuant to section 5(3). They rely on Chesapeake & Ohio Railway Company-Purchase, 261 I. C. C. 239, *supra*; Nicholas, Fayette & Greenbrier R. Co. Lease, 261 I. C. C. 546; and Warrior & Gulf Nav. Co. Control, 250 I. C. C. 26. These cases in turn refer to two others: United Parcel Service of Portland—Purchase—Wiese, 37 M. C. C. 473, and Atchison, T. & S. F. Ry. Co.—Control—Santa Fe Trail Transp., 15 M. C. C. 469. Although these cases show the need for I. C. C. authorization for consolidation under section 5(2), they do not support the present contention that such consolidation between already acquired subsidiaries constitutes "acquisition of control", or that a non-carrier parent not

previously subject to section 5(3) becomes subject to that section by such a consolidation. In Chesapeake & Ohio Railway Company-Purchase, *supra,* Alleghany, the non-carrier parent, was held subject to section 5(3) but this was not upon the basis of the intra-system consolidation in that case. It was upon the basis of Alleghany's application for retroactive approval of its acquisition of control over the Chesapeake & Ohio, the Nickel Plate and the Pere Marquette. Neither does Warrior & Gulf Nav. Co. Control, *supra,* constitute such a holding. There the Commission asserted that the acquisition of direct control of a subsidiary in place of indirect control through another subsidiary subjected the non-carrier parent to regulation under section 5(3). It concluded, however, that, because the parent was not primarily in the transportation business, it would not seek to exercise such regulation. Thus, the assertion in that case was but a dictum never put to the test of execution.

By another construction of the statute, also erroneous we think, the I. C. C. has created a situation where a non-carrier may, without approval of the I. C. C., acquire control of a railroad system and then, if and when it suits the non-carrier's convenience to seek refuge with the I. C. C., ask its approval of an intra-system merger and, as a result, obtain a declaration under section 5(3) that the non-carrier must thenceforth be considered as a carrier subject to the security issuance provisions of the Interstate Commerce Act. This second construction which we think erroneous is the one adopted in the opinion of the full Commission where it said "As Central, at the time of [Alleghany's] acquisition of control was recognized as a single established system, we conclude that the transaction was not within the scope of the above stated provisions of section 5(2) of the act and that our approval was not necessary."

Under Section 5(2) I. C. C. approval is required for the acquisition of two or more carriers. The statute says "carriers", not "systems", yet the I. C. C. has here held that control of a previously affiliated system may be obtained by a non-carrier corporation without its approval. Under simi-

lar circumstances the I. C. C. entertained applications for approval of the acquisition of a carrier holding company in Weinstein-Control-Capital Transit Co. and Montgomery, 56 M. C. C. 127, and Seaboard Air Line Ry. Co. Receivership, 261 I. C. C. 689. We believe that where a non-carrier acquires control of the parent corporation of a railroad system it acquires control of the subsidiaries and consequently of "two or more carriers" so as to require I. C. C. approval. The Commission mentions no authority in support of its position but it does express its distaste for the controversies into which it would be projected if it complied with a literal reading of the statute. We believe its position unsound and that it constitutes a surrender of power which Congress regarded as important to the public interest. The attendant difficulties conjured up by the Commission are greatly exaggerated. Without undue trouble it should be able to distinguish the usual proxy contest from the acquisition of holdings by a single person or corporation of such a block of stock that it has taken control from the other stockholders.

Consideration of the purposes of the statute emphasizes the destructive aspect of the construction put forward by the Commission. Congress was concerned with three problems: the consolidation of carriers into economically sound systems in accordance with a national plan of transportation to be developed by the I. C. C.; the affiliation of carriers through common parents; and the regulatory control of non-carrier parents. Each presented questions of fundamental nationwide importance, and constituted the very heart of the constructive, progressive program for which Congress looked to the Commission, rather than something to be avoided under the pressure of less important though perhaps more immediate tasks. Further, contrary to the views which apparently guided the Commission, Congress did not seek to hide or quiet controversy. It felt that the protection of the public lay in public exposure, as well as the expertness of the Commission. In section 5(b), it set forth not only the mandate that interested parties be heard but also the authorization for public hearing and the

requirement of notice to the governors of affected states for both consolidation and acquisition of control.

Here the Commission would escape any responsibility as to the acquisition of the Central by Alleghany and focus public attention only upon the merger of the Louisville and Jeffersonville Bridge & Railroad Company into the Big Four, all the while trying to keep regulatory control of Alleghany and thus preclude any consideration of the matter by the S. E. C. The undesirable consequences of the Commission's double misinterpretation of section 5 thus become all the more pointed. Alleghany's actions with respect to the New York Central and the use of its funds in that connection were transactions of a nature that Congress regarded with particular concern. Its concern was expressed in the Investment Company Act which imposed restrictions upon management of companies similar to Alleghany, and provided for regulation of these companies by the S. E. C. Its concern was also manifested in section 5 which, before the advent of the S. E. C., attempted to enable the I. C. C. to reach companies such as Alleghany. Here, the I. C. C.'s action defeats both plans for regulation.

The S. E. C. had commenced its own proceeding looking to a possible reassertion of its jurisdiction over Alleghany as an investment company. It suspended this proceeding to avoid conflict with the I. C. C. and submitted to it its plea that the I. C. C., in its discretion, recognize that, regardless of its claim to jurisdiction over Alleghany as a carrier, it was primarily an investment company rather than a transportation company, and that accordingly the I. C. C. not subject it to regulation under section 5(3). This is what the I. C. C. had done in other cases. See Warrior & Gulf Nav. Co. Control, 250 I. C. C. 26, *supra*. The I. C. C. denied the application of the S. E. C. apparently upon the ground that it had no power to comply with it, saying "We believe that unless Congress amends either or both of the statutes involved herein, the results which S. E. C. desires to achieve are not within our power under the Interstate Commerce Act." Such a conclusion is without foundation. Weinstein—Control, 56 M. C. C. 127, *supra*, Arkansas

& L. M. Ry. Co., 282 I. C. C. 254, Columbia Investment Co. —Control, 55 M. C. C. 375, Warrior & Gulf Nav. Co. Control, 250 I. C. C. 26, *supra;* Cambria & I. R. Co. Control, 275 I. C. C. 360; Cuyahoga Valley Ry. Co. Control, 252 I C. C. 683; Saginaw Dock & Term. Co. Contract Carrier Application, 260 I. C. C. 657. It is not necessary now for us to pass upon the question of whether the I. C. C.'s failure to comply with the S. E. C's petition is reviewable as an abuse of discretion.

Our conclusion that, where no acquisition of a carrier is involved, the I. C. C. has no jurisdiction under sections 5(2) and 5(3) to provide that a non-carrier shall "be considered as a carrier" subject to the security-issuance provisions of the Interstate Commerce Act does not mean that the proceeding below must be dismissed. Alleghany sought a finding that it controlled New York Central. It was on that theory that it considered itself a necessary party to the application under its interpretation of U. S. *v.* Marshall Transport Co., 322 U. S. 31. Regardless of whether the merger application involving the Bridge Company and the Big Four could have been presented without Alleghany's participation, the facts remain that Alleghany did participate, that it did ask for a determination of its control of New York Central as a condition to a declaration of its status as a non-carrier "considered as a carrier" and that the I. C. C. did so declare. The mere fact that Alleghany based its plea for consideration "as a carrier" on a request for approval of the merger rather than on a request for approval of acquisition of control of the New York Central is of no consequence where a finding of control of the New York Central was essential to the granting of its plea.

We do not think that the I. C. C. was without jurisdiction in the proceeding below to approve that acquisition. Indeed, if Alleghany was correct in its contention that it had acquired control of New York Central in a proxy fight preceding the stockholders' meeting of May 26, 1954, I. C. C. consideration of the question was long overdue. Under our interpretation of the statute the I. C. C. could

not have made a finding of control without approving control, yet it failed to make the prerequisite finding that the control was "consistent with the public interest" required by subdivision (b) of section 5(2). The case must go back for consideration of that question if Alleghany persists in its claim that it has acquired control of New York Central and in its desire for a declaration of its right to be "considered as a carrier".

Adequacy of the Finding of Control.

Even if we were to ignore the absence of a finding of consistency with the public interest, the I. C. C. made no adequate finding of control in the jurisdiction assuming order.

The findings in the determination under review on this subject are very oblique.

The provisions contained in the determination of Division Four are as follows:

> "The capital stock of Central is widely held by the public, but control of its functions reposes in Alleghany and its officers as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors. Alleghany has an undivided half interest in 600,000 shares of Central stock with voting rights to the 600,000 shares under joint venture agreements, and in addition, owns 15,500 shares. The voting rights of Alleghany represent almost 10 percent of the total shares of Central stock outstanding. The chairman of the board of directors of Alleghany, who holds the same position with Central, beneficially owns 100,200 shares of the latter's stock. The president of Alleghany is a director of Central, and beneficially owns 300,100 shares of the latter's stock. A vice-president of Alleghany holds a similar position with Central." (Sheet 3)
>
> "We recognize that the present control of the Central system has passed to Alleghany by regular

corporate procedures even though our approval in the premises has not been sought. • • • The important thing is that Alleghany does control one of our largest railroad systems and the regulation thereof in the public interest is our responsibility • • •" (Sheet 16)

"For the reasons stated we think that we are warranted in continuing Alleghany in its present status. Accordingly, we will, pursuant to section 5(3), subject Alleghany to the provisions of section 20 (1) to (10), inclusive, and section 20a (2) to (11), inclusive, of the Interstate Commerce Act. In the event that future circumstances warrant any change or modification of this finding, we retain jurisdiction to enter any order we deem necessary to protect the public interest." (Sheet 17)

The full Commission in its opinion said: (Sheet 9)

"The contention that Alleghany does not control the individual directors on Central's board ignores the realities of the situation. Alleghany and its allied interests have succeeded in electing sufficient members of the board to permit them to organize and elect their own officers. Clearly the tenure in office of such directors as permitted this action depends upon their conformance to the views of the stockholders who elected them. In our opinion the power thus reposing in Alleghany constitutes control of Central."

The full Commission also said: (Sheet 11)

"• • • We affirm the findings of Division 4 that these transactions and the continued control by Central and Alleghany are within the scope of section 5(2) of the act, as amended, that the terms and conditions are just and reasonable and that the transactions and continued control will be consistent with the public interest.

> "As appears from the foregoing discussion, Alleghany at the time it filed its application was in fact a person not a carrier which controlled an established system, and which was seeking authorization under section 5(2) for modified control of one of the system subsidiaries. • • • It is our opinion that division 4 properly applied the quoted provisions of the act. We affirm that ruling."

It will be observed from the above that Division 4 made an unqualified statement that it recognized that control of the Central had passed to Alleghany. That conclusion can stand, however, only if ultimate facts to support it are expressly found in the order of the Commission. Florida *v.* United States, 282 U. S. 194, 215; Yonkers *v.* United States, 320 U. S. 685, 692. To serve that purpose we have the statement of Division 4 that control of the functions of Central "reposes in Alleghany and its officers as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors." There is, however, nothing to support the statement that the nominees were actually chosen by Alleghany and some doubt is cast upon that by the fact that the preceding statement is that control reposes "in Alleghany and its officers". That statement in turn is much like the statement of the full Commission to the substantial effect that Alleghany "and its allied interests" control New York Central.

To return to the findings of Division 4, its order discloses the fact that Alleghany's beneficial holdings of the Central stock are less than the combined individual holdings of Kirby, Young, Richardson and the Murchison group.

In a proceeding before Judge Walsh involving the application for approval of the issuance of new preferred stock, Breswick *v.* Briggs, 130 F. Supp. 953, *supra,* he filed an opinion, dated April 6, in which he noted that Alleghany's voting power was increased by a joint venture agreement which gave it the power at that time to vote 300,000 shares

of the Murchison stock. He called attention to the fact that the details of this joint venture agreement as to terminability and other matters did not appear from the opinion of Division 4.

In spite of the fact that consideration of the applications for the orders now under review was undertaken subsequent to the filing with the Commission of Judge Walsh's opinion, no evidence supplementing the evidence outlined in the order of Division 4 in this case on the subject of control of the Central by Alleghany was introduced.

The position taken by the plaintiffs throughout has been that Alleghany was but an instrument employed by the Young-Kirby-Murchison group in the control of the New York Central and was in no sense in control. It is to be observed that the findings of neither Division 4 nor the I. C. C. meet this issue squarely.

We are forced, therefore, to the conclusion that the findings do no more than say that Alleghany, with someone else, controls New York Central. They do not even say whether the someone else, alone, has control. Does that satisfy the statute?

There is internal evidence in the statute itself that a non-carrier to have control within the meaning of that term as used in the statute must be in sole control. Section 5(2) enumerates cases, as we have said, of two kinds: one class dealing with carriers alone and the other class dealing with persons who are not carriers but are in control of one or more carriers. In the first class of cases, the statute enumerates instances where two or more carriers may be in control of another carrier, but when the statute comes to deal with the case of a non-carrier in control of carriers, it enumerates only the instances where "a person which is not a carrier" acquires control. Thus, the statute, by its terms, makes no attempt to cover the case where a carrier or carriers is controlled jointly by non-carriers.

This is not to say that where a group is nominally in control of a carrier no member of the group may be subjected to the obligation of Section 5. The supervisory jurisdiction over such combinations will turn on the facts of the case,

but those facts must at least be made explicit in the findings of the Commission. The purpose of a finding is to explain the basis of action, not to mask it.

We thus conclude that, if the Commission's opinions contain a conclusion that Alleghany is in control of New York Central, those opinions lack sufficient findings to support that conclusion.

THE FAILURE TO GRANT PLAINTIFFS A HEARING.

Section 5(2)(b) provides that, in such a proceeding as the jurisdiction assuming proceedings below, the Commission "shall afford reasonable opportunity for interested parties to be heard". Plaintiffs made repeated applications for leave to be heard in the jurisdiction assuming proceedings. It was only after Judge Walsh's opinion in the case involving the preferred stock was filed with the I. C. C. that plaintiffs' application for intervention was granted, and then it was granted only in the very order which approved the merger, foreclosed the issue and constituted Alleghany a person "considered as a carrier". All of that appeared in the order of May 24, 1955 of the full Commission. Division 4 had theretofore consistently denied intervention by the plaintiffs.

The action of the Commission in permitting intervention "as of the date" of the order of May 24, 1955 was completely insufficient, except perhaps to strengthen plaintiffs' standing as one entitled to review the order.

Plaintiffs' papers on this application are full of allegations of fact bearing on the question of control which should have been before the Commission and to which the Commission made no reference in its orders.

If plaintiffs were "interested parties" and thus entitled to be heard under the statute, there can be no doubt that the loss of their opportunity to present their evidence requires the setting aside of the determination. The Administrative Procedure Act, section 2(b), 5 U. S. C. §1001(b), defines "party" as follows:

> " 'Party' includes any person or agency named or admitted as a party, or properly seeking and

entitled as of right to be admitted as a party, in any agency proceeding".

It will be recalled that plaintiffs were finally permitted to intervene in the jurisdiction assuming proceeding. Under the Administrative Procedure Act there is no such thing as permission to intervene without permission to be heard and present evidence. Administrative Procedure Act, section 5(b), 5 U. S. C. §1004(b), reads as follows:

"*§1004. Adjudications.*

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,— • • •.

"*(b) Procedure.*

The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title."

Section 7(c), 5 U. S. C. §1006(c) provides:

"Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Even before the passage of the Administrative Procedure Act the necessity of granting a hearing to interested parties before the I. C. C. seems to have been settled. See U. S. *v.* Abilene & So. Ry. Co., 265 U. S. 274; Chicago Junction Case, 264 U. S. 258, *supra;* Int. Com. Comm. *v.* Louis. & Nash. R. R., 227 U. S. 88.

Defendants in opposition to this urge only that the matter of granting a hearing has been placed in the absolute discretion of the I. C. C. by section 5(2)(b) where it says:

> "If the Commission shall consider it necessary (in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest."

The above quoted language is in addition to and follows immediately after the mandatory direction "and shall afford reasonable opportunity for interested parties to be heard". It is thus clear that the public hearing referred to is something quite different from merely hearing the interested parties.

THE EFFECT OF THE VIEWS ABOVE EXPRESSED.

To paraphrase slightly the language of the Supreme Court in Mayo *v.* Canning Co., 309 U. S. 310, three-judge courts are admonished that, upon applications to them for preliminary injunctions the question before them is whether the showing made raises serious questions and discloses that enforcement of the act complained of, pending final hearing, would inflict irreparable damage on the plaintiffs.

We cannot believe that the Supreme Court intends that in a case such as this which presents only questions of law that have been fully argued and briefed by the parties we should limit our consideration to the degree of their seriousness. Our conviction that, more than being serious, they must be answered in favor of plaintiffs is a factor in our determination that an injunction should issue. If, however, a conclusion that the questions are serious is required, it is included in our conclusion that they must be answered in favor of the plaintiffs.

What we have said as to the damage which threatens plaintiffs supports the finding hereby made that unless

the enforcement of the orders complained of is enjoined pending final hearing plaintiffs will suffer irreparable damage.

We are authorized to say for the full court that it is prepared to do all in its power to expedite a final disposition of the cause.

An injunction will issue restraining, pending final judgment in this cause, the defendants Interstate Commerce Commission and Alleghany Corporation from enforcing or taking any action pursuant to (a) the orders of the I. C. C. made March 2, 1955 and May 24, 1955, in Finance Dockets 14629 and 18656, insofar as they determine that Alleghany Corporation is in control of The New York Central Railroad, and insofar as they determine that Alleghany Corporation shall be considered as a carrier subject to the provisions of section 20(1) to (10) inclusive and section 20a(2) to (11) inclusive of the Interstate Commerce Act, or (b) the order of the I. C. C. made May 26, 1955, and June 22, 1955, in Finance Docket 18866 authorizing issuance of 6% convertible preferred stock. The temporary restraining order against exchange of Alleghany Corporation's 6% Convertible Preferred Stock for its Cumulative 5½% Preferred Stock Series A, issued herein on June 23, 1955, is hereby continued pending final judgment.

Settle order on notice.

Dated: July 21, 1955.

E. DIMOCK
United States District Judge.

I concur.

LAWRENCE E. WALSH
U. S. D. J.

Opinion.

HINCKS, Circuit Judge, dissenting.

We have immediately before us only the plaintiffs' application for a preliminary injunction (1) to vacate the orders of the I. C. C. in Finance Docket Nos. 14692 and 18656 in so far as it was ordered therein "that unless and until otherwise ordered by this Commission, said Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20 (1) to (10), inclusive, and Section 20a (2) to (11), inclusive, of the Interstate Commerce Act, as amended, to the same extent that these provisions are applicable to the New York Central Railroad Company and its carrier subsidiaries and affiliates"; and (2) restraining the enforcement of the orders of said Commission in Finance Docket No. 18866 of May 26, 1955 (by Division 4 of the Commission) and of June 22, 1955 (by the Commission). The orders in said No. 18866 approved the substance and terms of an offer by the Alleghany Corporation whereby holders of its 5½%, Series A, preferred stock may, at their option, exchange their stock for stock in a new issue of convertible 6% preferred stock.

28 U. S. C. A. 2284 (3) provides power to grant "a temporary restraining order *to prevent irreparable damage*" which "shall contain a specific finding, based on evidence • • • and identified by reference thereto, that *irreparable damage* will result if the order is not granted." (Emphasis supplied). In context, the implication is plain that under the Urgent Deficiencies Act an order of preliminary injunction also must comply with this requirement. If there be any doubt as to the validity of that implication it is set at rest by *Mayo* v. *Canning Co.*, 309 U. S. 310. That was a case in which, as here, a three-judge court had before it an application for a preliminary injunction. The Supreme Court held that the granting of the injunction depended on ' whether the showing made raised serious questions" of law "and disclosed that the enforcement of the Act, pending final hearing, would inflict irrep-

arable damages upon the complainants." For present purposes I will assume that the showing before us raises serious questions of law and in this dissenting opinion will discuss only the showing made for its disclosure of the companion requirement of irreparable damage.

The application was submitted at a hearing, duly noticed, held on June 28, 1955 on a record of fact which includes only such facts as were admitted in the pleadings and affidavits in support and in opposition, no oral testimony having been offered. There was no stipulation that the submission made on the application should be deemed also to be a final submission on the merits.

The plaintiffs, who hold a comparatively small amount of Alleghany common stock[1] contend, *inter alia,* that the orders of the Commission, in so far as brought under review in this case, are void for lack of jurisdiction in that on the applicable facts and under the applicable law (particularly 49 U. S. C. A. 5 (3)) Alleghany was not a person which could lawfully "be considered as a carrier subject to" regulation under the Interstate Commerce Act. The status thus challenged is one depending upon a mixed question of fact and of law. Certainly it is so, and I think not disputed, that the Commission had at least jurisdiction to make a determination of Alleghany's status and, on finding a carrier status to exist, to exercise the jurisdiction thus resulting. Thus, the situation is not one in which the challenged orders are void on their face. At most, the orders are voidable for error in connection with the finding of complex but essential jurisdictional fact.

For purposes of the application now before us, I make the following assumptions: (1) that when the plaintiffs' complaint comes on for hearing on the merits, this court will set aside the orders under review for error in the finding of Alleghany's carrier status and will remand the case to the I. C. C. for further consideration; (2) that eventually a valid order will be entered by that Commission and also by the S. E. C. to the effect that Alleghany is not

[1] An intervenor has computed the plaintiffs' interest as comprising only .002% of the outstanding common stock.

subject to the Interstate Commerce Act and hence is not excepted by the Investment Company Act of 1940, 15 U. S. C. A. 80a-3 (c) (9), from those investment companies which are subject to that Act; and (3) that these plaintiffs have standing to bring this action.[2] Even so, in my view, for lack of sufficient showing of irreparable damage the plaintiffs are not entitled to the preliminary injunction sought.

The only facts upon which the plaintiffs appear to rely for the preliminary injunction are as follows. Alleghany proposes immediately to complete the distribution of an issue of convertible 6% preferred stock for distribution to holders of an outstanding 5½%, Series A, preferred stock in exchange, at the latters' option, for the Series A stock held by them. The distribution of the new stock, immediately upon entry of the I. C. C. order approving the issue, was partially accomplished before halted by the temporary stay order of this court (which was continued in force pending decision on the application now before us) and will be shortly completed (in so far as holders of the outstanding preferred stock elect to make the exchange) unless the

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[2] If plaintiffs' standing to sue is predicated upon a threatened loss of the protection afforded by the Investment Company Act, it it is difficult for me to reconcile my brothers' holding on this point with *Pittsburgh & W. Va. Ry.* v. *U. S.*, 281 U. S. 479, 487. For I find nothing in that Act which suggests that it was intended, or is effective, as a protection *peculiar to common stockholders*. Nor have plaintiffs shown that *as common stockholders* they have peculiar need of protection under that Act not available to all classes of Alleghany security holders under that Act. The *Pittsburgh* plaintiffs were held to be without standing because their "financial interest does not differ from that of every investor" in the Company. Even if it were so that the interest of these plaintiffs to protection under the Investment Company Act is as efficacious for purposes of standing to sue as a "financial interest," nevertheless it would seem to me to be an interest which "does not differ from that of every investor" in Alleghany securities. In *New York Central Securities Corp.* v. *U. S.*, 54 Fed. 2, 287 U. S. 12, the plaintiff's standing was not based on a claim of right to protection under the Investment Company Act. Reorganization cases and cases under 49 U. S. C. A. 20b involving the involuntary modification of rights of security holders are not pertinent to the standing of these plaintiffs.

injunction sought is granted. In the record as submitted, I find no other facts pertinent to the issue of irreparable damage. All else is by way of assertion and argument as to the impact on the plaintiffs' rights, as common stockholders, of a distribution of the new stock if the distribution is completed before approval, or disapproval, by S. E. C.

The plaintiffs' assertion of irreparable damage, if of any substance whatever, depends on the validity of their contention that the terms of the issue are such that it will necessarily or probably be disapproved by S. E. C. if and when, by hypothesis, it shall be submitted to S. E. C. That S. E. C. under the Investment Company Act might not approve the issue is, I concede a possibility. But the possibility is too remote for present relevance unless under the facts presently before us and under the provisions of the Investment Company Act it is reasonably certain that the issue would be disapproved by S. E. C. For this result, the plaintiffs in all their oral argument and in their voluminous briefs cite neither chapter nor verse. I find nothing in the Investment Company Act which would preclude an approval of the issue by S. E. C. For aught that appears even if the injunction is granted and eventually the proposed stock issue is submitted to the S. E. C., that tribunal after full exercise of its investigative and regulative powers may approve the issue. If this shall prove to be the end result, the plaintiffs will have gained only such satisfaction as they may take from the fact that action which they dislike has the sanction of two tribunals instead of one. Deprivation of such emotional satisfaction is no more irreparable damage than the "sentimental" loss which was held to be insufficient basis for an injunction in *Moffat Tunnel League v. U. S.*, 289 U. S. 113.

In this connection, I do not overlook the conclusory assertion in the complaint, wholly unsupported by proof, that officers of Alleghany stand to gain, directly or indirectly, from the proposed issue of preferred stock. The possibility of gain has no connotations necessarily sinister. The issue has been approved by large majorities both of

the preferred stock and the common stock. Presumably all who voted to approve expected gain. The achievement of that objective by others does not import damage to the plaintiffs. If, however, the assertion was meant to insinuate conduct by directors violative of fiduciary responsibility, it suggests that this litigation may be motivated by a decision to embarrass management by fomenting investigations by S.E.C., or that its true objective is by S.E.C. investigations to obtain ammunition for a stockholders suit. Certainly loss of opportunity to give vent to malice is not the equivalent of irreparable damage. And it seems equally clear that plaintiffs are not entitled to an injunction merely because they would like to supplement the discovery provisions of the Federal Rules by S.E.C. investigations. The mere frustration of such a hope is not of itself "irreparable damage." In this connection, it may be noted that by its report in Finance Docket No. 18866, the I.C.C. showed that it was fully apprised of the directors' stock interests in Alleghany.

My brothers point to the declared policy of the Investment Company Act to "mitigate • • • and to eliminate the conditions" which adversely affect "the interest of investors" • • • "when investment companies are operated or managed • • • in the interest of directors, officers, etc." They seem to hold that, even absent any showing of harm to these plaintiffs flowing from the assumption of jurisdiction by I.C.C. and absent any showing that the assumption of jurisdiction by S.E.C. will result in action more advantageous to their interest, they are entitled to the beneficent protection which the Investment Company Act provides against the improvidence or skulduggery of their own management. The possibility of deprivation of that protection, my brothers seem to feel, is proof enough without more to warrant the injunction.

I cannot agree. It is true that in their complaint plaintiffs allege that Alleghany's affairs have been conducted primarily in the interest of those in control. But for this we have only the plaintiffs' bare assertion: no evidence whatever has ever been offered to support that allegation.

My brothers make no finding on the point. Thus, for aught that appears this case does not even come within the policy declaration of the Investment Company Act which my brothers are assuming indirectly to enforce.

But that aside, I find nothing in that Act which gives investors in investment companies a right to enforce its policies. Section 42 of the Act, 15 U. S. C. A. 80a-41(a), specifies that "The Commission shall permit any person to file with it a statement in writing" as to the subject matter of possible investigations but leaves it to the Commission in its discretion to "make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provisions" of the Act. And by Section 80a 41 (e) S.E.C. is given power "in its discretion" to bring actions to enjoin violations in a district court. In the light of these carefully limited provisions I think it wholly inadmissible to interpret the Act as according to any private party, whether an investor or a potential investor, a right to enforce the policy of the Act as he conceives it to be. Nor do I think that this court, in the exercise of jurisdiction under the Urgent Deficiencies Act, has carte blanche to enforce its conception of the policy of the Investment Company Act. I conclude that at most these plaintiffs may derive an incidental benefit under the Investment Company Act; that the deprivation of such a benefit, which the plaintiffs concede has no measurable pecuniary value, is not "irreparable damage."

Further, my brothers seem to feel that the plaintiffs are entitled to the injunction sought because without it the proposed issue will be accomplished and, at least as a practical matter, the immediate cause of controversy will become moot. Granted that they are right as to the postulated result, I submit that the conclusion based thereon is faulty. The extraordinary and drastic remedy of injunction is not the product of a slot machine into which any disgruntled stockholder can insert a nickel. It does not issue in every case as of right merely to preserve the *status quo* pending final determination of the merits. Nor is its function merely to support hopes or malice. It issues only at

the discretion of the chancellor on a showing of irreparable injury. And that injury must be more than a vague statement of a remote and contingently potential harm. This principle was recognized—although, to be sure, in quite a different setting—in *New Jersey* v. *Sargent,* 269 U. S. 328; *Arizona* v. *California,* 283 U. S. 423; *Massachusetts* v. *Mellon,* 262 U. S. 447; and *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U. S. 249. I am not so much concerned by the *possibility* that the proposed stock issue may in the long-range future turn out to be disadvantageous to the common stock. After all that is essentially a question of business judgment primarily for management which in the normal course minority stockholders must accept. Here management has made its decision and the decision has been affirmed by a large majority of the voting stocks and approved by the I. C. C. To be sure, Alleghany may eventually be found to be subject to the Investment Company Act, with a result which may, or may not, be more advantageous to common stockholders. The loss of this remote and contingent advantage the law does not, I think, classify as irreparable damage.

Consequently, in the situation here, I am more concerned with the hardship that the injunction will impose on others. From the affidavit of Alleghany's secretary-treasurer received in opposition to the injunction sought, I find that the effect of the injunction will be seriously to embarrass Alleghany (a) in obtaining the renewal of various bank loans aggregating $8,200,000 which will mature on or about September 15, 1955 and (b) in its negotiations for refunding these loans on a more favorable basis. As a result it may become necessary to pay off the loans and for that purpose to liquidate part of its portfolio. (In this connection, I think it may be inferred that the most favorable terms cannot be obtained by forced liquidation to meet a fixed deadline and that such a liquidation, whatever the terms, is likely to interfere with investment policies). I find further that it will be necessary, if Alleghany is to maintain its policy of parity of representation between outstanding preferred stock issues and the common stock on its Board

of Directors, for it either to pay in full the large arrearages of dividends on the 4700 shares of Series A preferred stock which declined to accept the offer of exchange for the new 6% issue, thereby stripping that small block of the right to elect two directors, or to redeem that block of stock. Notice to redeem the stock cannot be given as long as an injunction precludes the distribution of the 400,000 shares of the new preferred still awaiting exchange, and even then under the Alleghany charter redemption can be accomplished only on a stated quarterly dividend date. If this course is precluded by an injunction, to maintain its policy of class representation Alleghany will be required to pay off the arrearages in dividends on this block of stock,—a course which is far more burdensome, tax-wise, to the stockholders involved than redemption which would classify as a capital transaction.

Further, I find from the affidavit of the intervenor Blatt, that at least 100,000 shares of the new preferred stock were traded on a "when issued" basis between May 26, 1955 and June 22, first in the over the counter market and commencing on June 8, 1955 on the New York Stock Exchange; and that trading therein proceeded in a substantial volume on an actual basis on June 24 when further trading on the New York Stock Exchange was suspended because of the stay order herein. From this it is fairly inferable that trading in the stock will not be resumed on the Stock Exchange if the stay order ripens into a preliminary injunction. The further inference is required that during the pendency of an injunction the marketability of the new stock which was issued, and consequently its value, will be substantially impaired and its acceptability as collateral will be largely destroyed. It is further inferable that an injunction which precludes stockholders who deposited their Series A stock for exchange from receiving the new stock will intensify the confusion and the hardship caused them by the stay order. Their rights, during the pendency of an injunction, to a return of the deposited stock and the obligation to return it involve complicated legal questions which may well require protracted litigation for resolution.

These findings I have tested against the affidavits of Mr. Phillips, one of the plaintiffs who has appeared throughout, *pro se.* His main affidavit shows that he is indeed a man of experience in the field of finance: that for a time prior to November 1941 he was "Executive Assistant" to the Chairman of Alleghany's Board. He states that "In July 1953 I became Financial Consultant to Alleghany Corporation and the C. & O. I was the first expert to be consulted by Mr. Young and Alleghany Corporation in connection with the contest for control of New York Central by the Alleghany-Young-Kirby nominees. Thereafter I was a member of the strategy board that successfully developed and executed the subsequent proxy campaign." But notwithstanding this background, neither by his main affidavit nor his reply affidavit does he show facts—as distinguished from self-serving conclusions—which controvert my findings as above stated. As to the damage to Alleghany which would result from an injunction, he bases his conclusion vaguely on his alleged knowledge of Alleghany's affairs as an insider. But he does not directly assert status as an insider subsequent to July 1953. He also professes to have "general knowledge of I. C. C., S. E. C., and banking practice." On this basis he offers as proof only his assertion of the very proposition which it was for him to prove, viz; "there is no substantial difficulty which will face Alleghany in the renewal of its $8,200,000 loan, due on Sept. 15, 1955." He says that Alleghany's annual report for 1954 showed "marketable securities on hand with an indicated market quotation of $67,944,633. He did not explain how these securities can be liquidated without loss or interference with investment policies before a deadline two months distant. And as to the impact of an injunction on Alleghany's negotiations to refund its bank loans, he says nothing. As to the impact of an injunction on the composition of Alleghany's board he seems to think that there is no limit to the extent to which this court can officiate as Alleghany's Board, saying: "it is obvious that this Court of Equity has full power to deal with the situation and to indicate that all holders of the Series A and the 6% Preferred Stock,

together, should be entitled to elect two directors." As to this, he assumes more knowledge of the powers of a chancellor than I, at least, possess.

As to the injurious effect of an injunction on Series A stockholders, Mr. Phillips says only that some at least may have deposited their stock as early as February 10, 1955 and thereby voluntarily consented that it should be "frozen" until the closing date of the exchange offer. He does not exclude the possibility that such stockholders might normally be expected to withhold deposit until the closing date was near at hand and deposit then in reliance on the terms of the exchange offer whereby they would receive marketable stock on a fixed date in the near future. He argues that because for a limited period accepting stockholders voluntarily assented to a freeze until a fixed date, it must follow that they will not be injured by an involuntary freeze continued into the indefinite future while this litigation winds its weary way through the courts and the two Commissions. I think the argument specious: without relying on the cries of anguish from frozen stockholders which were expressed informally at the hearing on this application, I think my findings of injury to them as above stated are clearly required as the only sensible inferences from proved facts.

The proved hardship to Alleghany and preferred stockholders is perhaps irrelevant if, as I think, plaintiffs have made no showing at all of irreparable damage. If, however, an appraisal of the record affords some support for a possible finding of such damage to them, I think the impact of injunction on Alleghany and the intervenors is a solid factor which should be given appropriate weight in the formulation of our discretion.

Lastly, I think it not permissible on the submission of a preliminary application, which raises the issue of irreparable damage, to proceed, at least in the setting of this case, to a determination of the underlying merits. I freely concede that for its impact on the validity of the orders under review the exegesis of my brothers demonstrates that the showing made is enough to satisfy the first requirement

of the quotation in an early page in this opinion from the *Mayo* opinion, viz., the existence of "serious questions" of law. But their exegesis, even if sound, goes no further than to demonstrate that the plaintiffs have solid ground for attacking the underlying jurisdiction: it does not reach the issue of irreparable damage. Before it can be reflected in a final decree, the defendants and intervenors are entitled as of right to a trial on the merits. At the trial the claim of irreparable damage will be in issue and may be expected to provoke a record of fact not now before us, on the basis of which the right to a permanent injunction must be determined. Even if, after trial, the court feels constrained to annul the orders under review for error in the proceedings before the Commission or in the Commission's jurisdictional findings, it may nevertheless decide that on the record as then made for lack of irreparable damage to the plaintiffs no injunction should issue to restrain Alleghany from completing the stock distribution. Such a disposition would leave Alleghany free to proceed at its own risk in confidence, if so advised, that on appeal the orders annulled would be reinstated. Surely the preliminary injunction now sought should not be granted merely because it is presently thought that at a later stage this court will annul the orders under review.

My conclusion is based not at all upon Alleghany's offer made in open court at the hearing to post a bond in a principal sum exceeding many times the value of the plaintiffs' stock to indemnify them from any loss resulting from the accomplishment of the proposed stock distribution. Nor am I affected by the plaintiffs' indifference to that offer. Since we are not now concerned with an application for a supersedeas bond, I view the offer as irrelevant.

I would terminate the stay order forthwith and deny the application for a preliminary injunction.

Document 2.

Order on Interlocutory Injunction.

[SAME TITLE.]

This Court having made an order dated June 15, 1955, convening a three-judge court pursuant to Title 28 U. S. C., Section 2284, and plaintiffs having by order to show cause dated June 15, 1955, moved this Court for an interlocutory injunction vacating or restraining the enforcement, operation and execution of orders of the Interstate Commerce Commission, dated March 2, 1955 and May 24, 1955, in Finance Dockets of the Interstate Commerce Commission Nos. 14692 and 18656, in so far as said orders approved and authorized the application of Alleghany Corporation before the Interstate Commerce Commission dated September 17, 1954, and plaintiffs' said motion for interlocutory injunction having duly come on to be heard before Honorable Carroll C. Hincks, Judge of the United States Court of Appeals for the Second Circuit; Honorable Edward J. Dimock, Judge of the United States District Court for the Southern District of New York, and Honorable Lawrence E. Walsh, Judge of the United States District Court for the Southern District of New York, on the 28th day of June, 1955, and Alleghany Corporation, The New York Central Railroad Company, and Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur H. Winner and Alvin J. Delaire, a copartnership, doing business as Gruss & Co., having prior to the aforesaid hearing of June 28, 1955, moved this Court by orders to show cause for leave to intervene and for leave to serve answers, and in the case of the aforesaid partnership for other relief, and said motions having been granted in open court on June 28, 1955, in so far as said motions sought leave to intervene and to be permitted to serve answers; and the Court, per Dimock, J., having made an order dated June 23, 1955, restraining and enjoining Alleghany Corporation, its transfer agents,

officers, directors, servants and employees, and each of them, from issuing, distributing or transferring any of the 6% Convertible Preferred Stock of Alleghany Corporation, which is the subject of the application before the Interstate Commerce Commission in Finance Docket No. 18866, or attempting so to do until the hearing and determination by this Court of plaintiffs' motion for preliminary injunction annulling the order of the Interstate Commerce Commission dated May 24, 1955 in Finance Docket No. 18656; and plaintiffs having moved this Court by order to show cause dated July 8, 1955, for an order permitting plaintiffs to serve a supplemental complaint and granting or denying, without further proceedings, plaintiffs' motion for an interlocutory injunction with respect to orders of the Interstate Commerce Commission dated May 26, 1955 and June 22, 1955, in Finance Docket No. 18866, to the same extent that plaintiffs' motion for the same relief is granted or denied with respect to the orders of the Interstate Commerce Commission dated March 2, 1955 and May 24, 1955, in Finance Dockets Nos. 14692 and 18656; and Samuel A. Mehlman having by order to show cause dated July 12, 1955, moved for leave to intervene and to serve an answer, and said motion of plaintiffs brought on by said order to show cause dated July 8, 1955, and said motion of Samuel A. Mehlman having both come on to be heard on July 13, 1955, and the motion of Samuel A. Mehlman having been granted in open court on July 13, 1955; and the parties having entered into a stipulation with respect to plaintiffs' motion seeking leave to amend their complaint in open court on July 13, 1955; and upon the orders of this Court above mentioned, dated June 15, 1955 and June 23, 1955, and upon the aforesaid order to show cause dated July 8, 1955; and upon reading and filing the summons and complaint, the stipulation entered into in open court made July 13, 1955, the orders of this Court dated June 30, 1955 and July 15, 1955, granting leave to various parties to intervene and serve answers; and upon the affidavits of Randolph Phillips, affirmed to June 15, 1955, June 28, 1955, June 29, 1955, and July 7, 1955, and the affidavits of George Brussel, Jr. sworn

to June 23, 1955 and July 13, 1955, all the same above mentioned affidavits in support of the motions of plaintiffs and in support of the aforesaid restraining order dated June 23, 1955; and upon the affidavits of David W. Wallace sworn to June 27, 1955 and July 13, 1955, the affidavits of Harold H. McLean sworn to the 24th and 27th days of June, 1955, and the affidavits of Charles H. Blatt sworn to June 27, 1955 and July 13, 1955, and the affidavit of Samuel A. Mehlman sworn to July 11, 1955, all in opposition to plaintiffs' applications for preliminary injunctions and in opposition to the continuance of the aforesaid order dated June 23, 1955; and plaintiffs having on June 24, 1955, pursuant to the direction of this Court, filed an undertaking in the sum of $1,000, and upon the answers of Alleghany Corporation; The New York Central Railroad Company; Samuel A. Mehlman; the aforesaid partnership, Gruss & Co.; and after hearing Rosston, Hort & Brussel (George Brussel, Jr., of counsel), attorneys for plaintiff, Breswick & Co., and Randolph Phillips, *pro se,* in support of plaintiffs' motion for an interlocutory injunction and in support of plaintiffs' application for a temporary restraining order and the continuance thereof, and after hearing White & Case and Wheeler & Wheeler (David Hartfield, Jr. and Edward K. Wheeler, of counsel), attorneys for defendant, Alleghany Corporation; Leo H. Pou, attorney for defendant, Interstate Commerce Commission; Herbert Brownell, Jr., Attorney-General of the United States of America (James H. Durkin, of counsel), attorney for defendant, United States of America; Harold McLean and Wheeler & Wheeler (Edward K. Wheeler and Arthur H. Bernstein, of counsel), attorneys for defendant, The New York Central Railroad Company; Proskauer, Rose, Goetz & Mendelsohn (Harold H. Levin, of counsel), attorneys for the aforesaid individuals doing business as Gruss & Co.; Samuel A. Mehlman, Esq., *pro se,* and Cahill, Gordon, Reindel & Ohl (Paul W. Williams, of counsel) as *amicus curiae* on behalf of Reynolds & Co., G. H. Walker & Co., Ernst & Co., Kidder, Peabody & Co., E. F. Hutton & Co., Eisele & King, Libaire, Stout & Co., Abraham & Co., Goldman, Sachs & Co., Bear

Stearns & Co. and Peter Lavan, all in opposition to plaintiffs' motion for temporary injunction and in opposition to the continuance of the restraining order of this Court dated June 23, 1955, and upon all the proceedings hitherto had herein, and due deliberation having been had, and the Court having rendered its opinion containing findings of fact and conclusions of law, with Hincks, C. J., dissenting, it is

ORDERED, that defendants, Interstate Commerce Commission and Alleghany Corporation, be and they hereby are restrained, pending final judgment in this cause, from enforcing or taking any action pursuant to (a) the orders of the Interstate Commerce Commission made March 2, 1955 and May 24, 1955, in Finance Dockets 14692 and 18656, in so far as they determine that Alleghany Corporation is in control of the New York Central Railroad and in so far as they determine that Alleghany Corporation shall be considered as a carrier subject to the provisions of Section 20 (1) to (10) inclusive and Section 20a (2) to (11) inclusive of the Interstate Commerce Act, or (b) the orders of the Interstate Commerce Commission made May 26, 1955 and June 22, 1955 in Finance Docket 18866, authorizing issuance of 6% Convertible Preferred Stock; and it is further

ORDERED, that Alleghany Corporation, its transfer agents, officers, directors, servants and employees, and each of them, be and they hereby are enjoined from issuing, distributing or transferring or converting into Common Stock any of the 6% Convertible Preferred Stock of Alleghany Corporation, which was the subject of the application before the Interstate Commerce Commission in Finance Docket No. 18866, or attempting to do so, pending final judgment in this cause; and it is further

ORDERED, that the caption of this case be and it hereby is amended so as to read as follows:

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

BRESWICK & Co. and RANDOLPH PHILLIPS, as common stockholders of Alleghany Corporation,

Plaintiffs,

against

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, THE NEW YORK CENTRAL RAILROAD COMPANY; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership, doing business as Gruss & Co., and SAMUEL A. MEHLMAN,

Defendants.

and it is further

ORDERED, that plaintiffs furnish, within three days after the entry of this order, a bond in the sum of $1,000 as security for the payment of such costs and damages as may be incurred or suffered by Alleghany Corporation if it be found to have been wrongfully enjoined by this order.

The reasons for the issuance of this preliminary injunction are:

1. This case presents only issues of law which are serious and are resolved in favor of the plaintiffs.

2. That unless the enforcement of the orders complained of be enjoined pending final hearing plaintiffs will suffer irreparable damage in that:

A. As found by this court plaintiffs have the right to invoke the protections of the Investment Company Act

against jurisdiction of the Interstate Commerce Commission unlawfully asserted and have no adequate remedy at law to vindicate that right.

B. The unlawful acts of the Interstate Commerce Commission have deprived plaintiffs of the preferences, privileges and protection of the Investment Company Act and the Interstate Commerce Act against manipulation of those in control of Alleghany Corporation, including the possibility of dilution of the equity of the common stockholders by conversion of the new preferred stock and yet be remediless in spite of the adjudged illegality of the preferred stock.

C. Unless the issuance of the proposed preferred stock is enjoined it will be issued and in many cases reach the hands of bona fide purchasers so that an unscrambling, in the event of a determination that the Interstate Commerce Commission approval was unlawful, would be a practical impossibility.

D. The Investment Company Act was enacted to protect the national public interest and the interest of investors, one of the purposes being to protect investors in investment companies against the managing of those companies in the interests of persons other than the investors, and the preliminary injunction is necessary to preserve for the plaintiffs the benefits and protection of the Investment Company Act, pending final hearing.

E. The denial of a preliminary injunction would deprive plaintiffs of findings required by Section 5(2) of the Interstate Commerce Act, that the orders reviewed are consistent with the public interest and otherwise comply with the provision of said Sections 5(2) and 5(3).

Dated: New York, N. Y., July 26, 1955.

s/ E. J. Dimock,
U. S. D. J.

Document 3.

Opinion on Supersedeas Pending Appeal.

[SAME TITLE.]

HINCKS, C. J.:

I think the stay sought should be granted. The hardship both on Alleghany and its stockholders is plain. This was described in my dissenting opinion addressed to the plaintiffs' application for the preliminary injunction. The injunction granted at most has urgency only for its effect in restraining the completion of Alleghany's exchange offer. This feature of the injunction has its chief impact on innocent stockholders. At the hearing, Alleghany made representations, which to me were highly credible, to the effect that the utmost possible damage to the plaintiffs from the dilution of their stock which might result from the exchange offer aggregated $1,015. I think a bond of $2,500 would adequately protect the plaintiffs legitimate pecuniary interest. The injunction, insofar as it is addressed to the orders of the Interstate Commerce Commission, is not at all needed to protect plaintiffs' pecuniary interest. Nor will the plaintiffs be at all injured if it goes into effect not until after the order of injunction is affirmed on appeal. Its suspension pending appeal will save the established practice of the Interstate Commerce Commission from disturbance pending a final decision as to its validity. The suspension is also desirable to prevent the hardship to Alleghany mentioned in my dissenting opinion and also to enable the New York Central Railroad Company, which was a party to the proceedings before the Commission and is a party in this case, to proceed with arrangements for its own internal reorganization in which these plaintiffs under no theory have a legitimate interest.

July 26, 1955.

Document 4.

Opinion on Supersedeas Pending Appeal.

[SAME TITLE.]

DIMOCK, D. J.:

Defendants moved for a suspension of an injunction pending appeal to the Supreme Court, presumably under authority of Rule 62(c) F. R. C. P.

The action is one to enjoin permanently the enforcement of orders of the Interstate Commerce Commission by which the Commission has, in effect, assumed jurisdiction, to the exclusion of the Securities and Exchange Commission, over the security issuing activities of Alleghany Corporation and by which it has authorized a particular exchange of 6% preferred stock for 5½% preferred stock.

Plaintiffs contend that the I. C. C. has no power to assume such jurisdiction because Alleghany does not have "control of a carrier" within the meaning of Section 5(2) of the Interstate Commerce Act, 49 U. S. C. §5(2) that the I. C. C.'s finding of such control was insufficient and that the I. C. C. committed substantial error in refusing plaintiffs a hearing on the question.

On a motion for a preliminary injunction, a three-judge court has held that the I. C. C.'s findings were insufficient and that it committed substantial error in refusing plaintiffs a hearing. The court has accordingly enjoined, pending final hearing, the enforcement of the I. C. C.'s assumption of jurisdiction and the consummation of the exchange. The injunction against the consummation of the exchange continued in force a restraining order to the same effect.

Alleghany, on February 10, 1955, mailed to the holders of its 5½% preferred stock an offer for its exchange for a new 6% preferred stock.

On February 15, 1955 plaintiff Breswick & Co. sought from the Commission leave to intervene in the proceeding

which resulted in the jurisdiction assuming order. Alleghany opposed and leave was originally denied.

The preferred stock exchange offer required all who wished to accept it to deposit their stock certificates. It was conditional upon approval by the I. C. C. and its acceptance by 100,000 shares or such lesser number as the corporation might deem satisfactory to it. On the expiration of five business days after the issuance of the I. C. C. order the stock could not be withdrawn. There was no provision postponing the consummation of the exchange in the event of court review of the I. C. C. approval.

A proceeding was brought before the I. C. C. for the approval of the exchange and plaintiffs sought leave to intervene. Like the application for leave to intervene in the other proceeding, this was opposed by Alleghany and originally denied by the I. C. C. After a decision by Judge Walsh in another case, however, intervention in the preferred stock proceeding was permitted by the I. C. C. Plaintiffs filed a brief taking the position that approval should not be given and closing with the request in substance that, if the I. C. C. should be disposed to grant approval, its order should be stayed long enough to permit plaintiffs to begin court proceedings before the exchange should be consummated.

In spite of this request, the full Commission issued an order approving the exchange dated June 22, 1955. Alleghany learned of this about noon on June 23, 1955 and, although plaintiffs had already noticed in this case a motion for a preliminary injunction against assumption of jurisdiction by the I. C. C., immediately began issuing the new preferred stock to those who had accepted the exchange offer. Plaintiffs learned of the I. C. C. approval in the middle of the afternoon and, at 5:55 P. M. obtained a temporary restraining order against further exchange and against transfer of the new stock. By that time, however, more than half of the new stock had been issued. The restraining order has been continued as a preliminary injunction pending final hearing.

Alleghany now seeks to avoid the hardships to which this state of affairs subjects it and asks that the injunction be suspended pending appeal. The result of suspending the injunction, so far as the exchange of preferred stock is concerned, would be in substance a modification of the court's decision. The exchange would take place and plaintiffs would be left to their remedy at law, if any.

If Alleghany were the only person subjected to hardships the question would be easy. All that Alleghany offers plaintiffs is money indemnity and the basis of the award of the injunction was that money indemnity would be inadequate. Moreover, Alleghany finds itself subject to hardships only because of its original omission to take into account the possibility of court review and its later precipitate action under the I. C. C.'s order while the question of the I. C. C.'s jurisdiction were *sub judice*.

What makes the question perplexing is the plight of innocent stockholders who have given up their old preferred stock and have got a frozen asset in return. Alleghany, pleading the cause of these innocent people as a reason why plaintiffs should be deprived of what I conceive to be their legal rights, seems to me an invader who drives before his soldiers a protecting barrage of civilians.

I vote to deny the application for a suspension of the injunction pending appeal.

Dated: July 26, 1955.

/s/ E. J. Dimock
United States District Judge

Document 5.

Order Denying Supersedeas.

[Same Title.]

Defendant Alleghany Corporation having moved for a suspension of the injunction pending appeal on a show cause order which issued on July 21, 1955 returnable on July 26, 1955, the court comprised of Judges Hincks and Dimock convened on the return day, and proceeded to hear the motion in the absence of Judge Walsh whose participation could have been obtained only on a substantial continuance of the matter. The undersigned two Judges having heard said motion and having been unable to agree upon the determination thereof for the reason stated in the memoranda filed by them therewith, it is hereby

Ordered that said motion be and the same hereby is denied.

Dated: July 26, 1955.

/s/ Carroll C. Hincks, C. J.

/s/ E. J. Dimock

Document 6.

Order.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM 1955.

BRESWICK & Co. and RANDOLPH PHILLIPS, as common stockholders of Alleghany Corporation,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, THE INTER-STATE COMMERCE COMMISSION, ALLEGHANY CORPORATION, THE NEW YORK CENTRAL RAILROAD COMPANY; JOSEPH S. GRUSS, CHARLES H. BLATT, ALBERT B. COHEN, ARTHUR A. WINNER and ALVIN J. DELAIRE, a copartnership, doing business as Gruss & Co., and SAMUEL A. MEHLMAN,

Defendants.

An application having been made before me by defendant, Alleghany Corporation, for an order (a) staying, pending appeal to this Court under 28 U. S. C. Sec. 1253, a preliminary injunction order of a three-judge court of the United States District Court for the Southern District of New York made on July 26, 1955, (b) granting supersedeas upon Alleghany posting an appropriate and sufficient bond, and (c) setting the appeal for argument on the first day of this Court in October, and said application having come on to be heard before me on August 1, 1955, at the United States Court House, Foley Square, New York, New York, and upon reading and filing the notice of the application and supporting affidavit of David Hartfield, Jr., sworn to July 25, 1955, and the affidavit of Harold H. Levin, sworn to July 28, 1955, in support of said application, and the affidavits of Randolph Phillips, affirmed

to the 1st day of August, 1955, and George Brussel, Jr., sworn to the 1st day of August, 1955, in opposition to said application; and after hearing David Hartfield, Jr., and Edward K. Wheeler, attorneys for defendant, Alleghany Corporation, and Harold H. Levin, attorney for defendants, Joseph S. Gruss, Charles H. Blatt, Albert B. Cohen, Arthur A. Winner and Alvin J. Delaire, a copartnership, doing business as Gruss & Co., and Edward K. Wheeler, attorney for defendant, The New York Central Railroad Company, and Samuel A. Mehlman, defendant *pro se*, and John T. Cahill, as *amicus curiae* for Reynolds & Co., G. H. Walker & Co., Ernst & Co., Kidder, Peabody & Co., E. F. Hutton & Co., Eisele & King, Libaire, Stout & Co., Abraham & Co., Goldman Sachs & Co., Bear Stearns & Co. and Peter Lavan, all in support of said application, and George Brussel, Jr., attorney for plaintiff, Breswick & Co., and Randolph Phillips, plaintiff *pro se* in opposition to said application, and after hearing William H. Timbers, *amicus curiae* on behalf of the Securities and Exchange Commission, and after hearing statements in open court read on behalf of the United States of America and the Interstate Commerce Commission; and having filed a memorandum opinion, dated August 3, 1955, with respect to such application, and Alleghany Corporation having filed its notice of appeal to this Court from the order below, now it is

ORDERED, that upon defendant, Alleghany Corporation, filing simultaneously with the entry of this order a surety bond running to plaintiffs in the amount of $14,000, containing the usual conditions, and in addition indemnifying the plaintiffs against all loss and damage arising out of (1) dilution of the value of their common stock by reason of the conversion of any of the new preferred stock and (2) the absence of Investment Company Act protection, pending final determination of the issues involved in this litigation, the order below made July 26, 1955 and entered July 27, 1955, be and the same hereby is stayed pending appeal to this Court in so far as said order below enjoins Alleghany Corporation, its transfer agents, officers, direc-

tors, servants and employees, and each of them, from issuing, distributing or transferring or converting into common stock any of the 876,800 shares of 6% convertible preferred stock of Alleghany Corporation delivered by Marine Midland Trust Company of New York, Exchange Agent, prior to notice of the restraining order made, per Dimock, J., on June 23, 1955, below, which said stock was the subject of the application before the Interstate Commerce Commission in Finance Docket No. 18866, or attempting to do so, pending final judgment in this cause; and it is further

ORDERED, that such part of the order below as enjoins and restrains defendant, Alleghany Corporation, pending final judgment in this cause, from taking any action pursuant to the orders of the Interstate Commerce Commission made May 26, 1955 and June 22, 1955 in Finance Docket 18866, authorizing issuance of 6% convertible preferred stock, be and the same hereby is stayed to the extent set forth in the first ordering paragraph of this order pending appeal to this Court; and it is further

ORDERED, that said application be and the same hereby is in all other respects denied.

Dated: August 9, 1955.

(Sgd) JOHN M. HARLAN,
Justice of the United States
Supreme Court.

Document 7.

Report of the Commission.

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 18656[1]

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

Submitted February 24, 1955. *Decided March 2, 1955*

1. (a) Merger of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by the New York Central Railroad Company and the Alleghany Corporation; and

(b) Modification of the lease of January 2, 1930, under which the New York Central Railroad Company, lessee, operates the property of the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, lessor, to give effect to the merger described in (a) above, approved and authorized. Conditions prescribed.

2. Alleghany Corporation subjected to the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act.

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[1] Also embraces Finance Docket No. 14692, Chesapeake & Ohio Railway Company Purchase, etc. Previous reports, 261 I. C. C. 239, and 271 I. C. C. 5.

3. Effective portions of the order of June 5, 1945, in Finance Docket No. 14692, terminated and of no further force and effect.

4. Jurisdiction retained to make such further order or orders as hereafter may be necessary or appropriate.

HAROLD H. MCLEAN, BURTON K. WHEELER, and EDWARD K. WHEELER for applicants.

WILLIAM H. TIMBERS for the United States Securities and Exchange Commission, intervener for limited purpose.

DIVISION 4, COMMISSIONERS JOHNSON, MITCHELL, AND CROSS.

By DIVISION 4:

The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, the Louisville & Jeffersonville Bridge and Railroad Company, The New York Central Railroad Company, and the Alleghany Corporation, hereinafter referred to as Big Four, Jeffersonville, Central, and Alleghany, respectively, on September 20, 1954, jointly applied under section 5(2) of the Interstate Commerce Act, as amended, herein sometimes called the Act, for approval and authorization of (1) (a) merger of the properties and franchises of the Jeffersonville into the Big Four for ownership, management, and operation; and (b) modification of the lease of January 2, 1930, under which Central, as lessee, operates the property of Big Four, lessor, to give effect to the acquisition of additional property pursuant to the proposed merger of Jeffersonville into Big Four; (2) acquisition by Central and Alleghany, by virtue of their control of Big Four, of control of the properties of Jeffersonville; and (3) continuation of Alleghany's status as a carrier subject to the provisions of section 20(1) to (10), inclusive, and 20a(2) to (11), inclusive, of the Act, as provided by section 5(3) thereof. Alleghany filed a supplemental application on December 6, 1954.

Pursuant to its petition received September 28, 1954, and a supplemental petition dated December 14, 1954, the

Securities and Exchange Commission, herein referred to as S. E. C., was permitted to intervene in this proceeding for the limited purpose of filing its memorandum of September 14, 1954, and the supplement thereto, in opposition to continuation by us of Alleghany's status as a carrier subject to the Act.

Petitions for leave to intervene in the proceedings herein were filed with us by so-called "independent directors" of the Missouri Pacific Railroad Company, by Lewis D. Gilbert and John Gilbert, and Breswick & Company, so-called independent investors and stockholders in Alleghany Corporation and the New York Central Railroad Company. Leave to intervene was not granted and the petitions were denied.

No other protest to the application has been received, and no representations have been made by any State authorities. We are of the opinion that a public hearing is not necessary in the public interest for the reason that the proposed merger will simplify the corporate organization of Big Four, and that the related proposed transactions, subject to the terms and conditions specified herein, will not adversely affect transportation service available to the public.

The New York Central Railroad Company.—Central is the parent company of the New York Central Railroad system. It was organized under the laws of New York, Pennsylvania, Ohio, Indiana, Illinois, and Michigan following the consolidation of the New York Central & Hudson River Railroad Company, the Lake Shore & Michigan Southern Railway Company, and others, under an agreement of April 29, 1914, and pursuant to our order of June 18, 1952, in Finance Docket No. 17700, *New York Central R. Co. Merger,* 282 I. C. C. 813 (not printed in full), merged into itself certain wholly-owned and controlled subsidiary carriers. Its corporate history and other pertinent information are contained in Finance Docket No. 5690, *New York Central Unification,* 150 I. C. C. 278, 154 I. C. C. 489. For purposes of identification, the carriers related to the Cen-

tral system, as of June 30, 1954, are listed in the Appendix attached hereto.

The capital stock of Central is widely held by the public, but control of its functions reposes in Alleghany and its officers as a result of a proxy contest preceding a stockholders' meeting of May 26, 1954, at which the nominees chosen by Alleghany were elected as Central's board of directors. Alleghany has an undivided half interest in 600,000 shares of Central stock with voting rights to the 600,000 shares under joint venture agreements, and in addition, owns 15,500 shares. The voting rights of Alleghany represent almost 10 percent of the total shares of Central stock outstanding. The chairman of the board of directors of Alleghany, who holds the same position with Central, beneficially owns 100,200 shares of the latter's stock. The president of Alleghany is a director of Central, and beneficially owns 300,100 shares of the latter's stock. A vice-president of Alleghany holds a similar position with Central.

The Cleveland, Cincinnati, Chicago & St. Louis Railway Company.—Big Four was organized under the laws of Ohio and Indiana, following the consolidation of the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, and the Cincinnati, Indianapolis, St. Louis & Chicago Railway Company under an agreement of March 19, 1889, and pursuant to our order of June 17, 1938, *Cleveland, C. C. & St. L. Ry. Co. Merger,* 228 I. C. C. 240, merged into itself certain other companies which it controlled. It owns and leases lines of railroad in Ohio, Indiana, Illinois, and Michigan and has trackage rights over 2.12 miles of line in Kentucky, and 8.18 miles in Missouri. It was an operating carrier until February 1, 1930, since which time Central has operated it as lessee under an agreement of January 2, 1930, authorized pursuant to conditions contained in *New York Central Unification, supra.* Central owns 465,514 shares of the common stock of Big Four, and 86,436 shares of its preferred stock, constituting 98.98 percent of the common, and 86.45 percent of the preferred stock outstand-

ing. In addition to the control of Jeffersonville, explained below, Big Four and Central by stock ownership or lease also control the Peoria & Eastern Railway Company and the properties of the Central Railroad Company of Indianapolis.

The Louisville & Jeffersonville Bridge & Railroad Company.—Jeffersonville was organized pursuant to a consolidation agreement dated April 25, 1890, between separate companies named the Louisville & Jeffersonville Bridge Company, organized in Kentucky and Indiana. It now exists under laws of those States, and its physical properties are located therein. The capital stock of Jeffersonville is owned by Big Four, and held by Central under lease. Alleghany states that with Central, it indirectly controls Jeffersonville through the Big Four.

The Alleghany Corporation.—Alleghany was incorporated in Maryland in 1929, under a charter providing broad powers to engage in any lawful business. Since its creation, it has been in the investment business dealing in corporate securities including those of railroad companies subject to the Act. Subject to certain conditions in our order of June 5, 1945, Finance Docket No. 14692, *Chesapeake & O. Ry. Co. Purchase*, 261 I. C. C. 239, hereinafter referred to as the *Chesapeake case*, among other things, Alleghany was authorized, through ownership of stock, to acquire control of the Chesapeake & Ohio Railway Company, herein called Chesapeake; the New York, Chicago & St. Louis Railroad Company, and the Pere Marquette Railway Company, and their respective subsidiaries and affiliates, herein together referred to as the Chesapeake system. That proceeding arose in connection with the purchase by Chesapeake of the properties of the Norfolk Terminal & Transportation Company, the capital stock of which was owned, and the properties of which theretofore had been operated under lease, by Chesapeake.

The report in the *Chesapeake case* shows that in addition to the stock of the Chesapeake system owned by Alleghany, it also then owned stock of other carriers subject

to the Act, not affiliated with Chesapeake or its system. Among those securities, it owned considerable stock of the Missouri Pacific Railroad Company, the control of which was vested in a trustee subject to the jurisdiction of the United States District Court, Eastern Division, Eastern Judicial District of Missouri, in a pending reorganization under section 77 of the Bankruptcy Act; 46,700 shares of Erie Railroad Company common stock; and 248,120 shares of common and 29,190 shares of preferred stock of the Pittston Company, which owns all the outstanding stock of the United States Trucking Corporation, a motor carrier subject to part II of the Act. Chesapeake owned 190,625 shares of common and 22,426 of preferred stock of the Pittston Company, of whose 10 directors, 2 also served as directors of Chesapeake and 1 as director of New York, Chicago & St. Louis Railroad Company.

The order of June 5, 1945, referred to in the preceding paragraph, among other things, also held that Alleghany should be considered as a carrier subject to section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Act. It also provided for the creation of separate voting trust agreements into which Alleghany and Chesapeake were ordered to deposit their respective holdings of the Pittston Company's stock, and the owned or after-acquired stock of any carrier not related to the Chesapeake system, and to eliminate and avoid any interlocking directorates between carriers whose stocks are so trusteed and the Alleghany or the Chesapeake system. In view of our action subjecting Alleghany to certain provisions of the Act, the S. E. C., under the Investment Company Act of 1940, herein called the investment act, on October 4, 1945, terminated the registration of Alleghany as a closed-end nondiversified management investment company, subject to the proviso that, if and when Alleghany ceases to be considered as a carrier subject to the Interstate Commerce Act, the order of exemption from registration as an investment company might be revoked, suspended, or modified. In its quarterly report of securities held under the trusts, which Alleghany was required to file according to the order

in the *Chesapeake case*, we were advised that as of the end of September 1954, Alleghany had no securities on deposit in either of the voting trusts which we required to be set up. In the application herein, Alleghany states it has no intercorporate relationships with carriers subject to the Act, except the ownership of securities of carriers of the Central system, which Alleghany alleges it controls (and stock of the Missouri Pacific Railroad Company, debtor in reorganization).

Alleghany states it now is operating under a policy of simplifying Central's corporate organization, and from time to time will apply for authority to change the internal structure thereof by mergers, consolidations, leases, and/or other acquisitions of properties. In a related proceeding to be discussed subsequent herein, Alleghany showed that its investments as of October 14, 1954, included rail securities 52 per cent, nonrail securities 15 percent, cash and U. S. Treasury bills 6 percent, and notes receivable 27 percent. In the supplement herein filed December 6, 1954, it shows that as of the close of business November 30, 1954, its portfolio, at cost, totaled $70,855,069, invested in rail securities to the extent of 67.76 percent, nonrail 7.78 percent, cash 0.44 percent, and notes receivable 24.02 percent. In a subsequent pleading herein, Alleghany states that as of December 31, 1954, its nonrail investments, at cost, constituted only 6.45 percent of its portfolio. Under present plans, excluding Government bonds, Alleghany asserts that it expects to maintain in rail securities not less than 75 percent of its portfolio.

Prior Proceedings related hereto.—The events and transactions which ostensibly terminated the power of Alleghany to control the Chesapeake system, and vested it with power to control the Central system gave rise to several petitions and requests which were instituted before the present application was filed. In the order of their receipt the earlier proceedings were as follows:

A petition received March 2, 1954, and supplemented March 12, 1954, was filed by Central, requesting us, upon

our own motion, to investigate the transactions of Alleghany and Chesapeake to determine (a) if Alleghany, directly or indirectly, continues to control Chesapeake; (b) if the purported sale of 800,000 shares of Central stock by Chesapeake to Clinton W. Murchison and Sid W. Richardson in February 1954, was in compliance with the terms of the trust agreement under which Alleghany deposited the Central stock as required in the order of June 5, 1945; (c) if Alleghany owns or holds the voting stock of any carrier corporations which should have been, but were not placed in trust under the conditions referred to in (b) hereinabove, and (d) if the Clayton Anti-Trust Act had been violated by Chesapeake through acquisition by it of the 800,000 shares of Central stock referred to in (b).

Inquiries by our representatives disclosed no reasonable evidence upon which to question the validity or the effect of Alleghany's divesting itself of the stock of, and representation on the board of directors of Chesapeake; of the sale of Central's stock held for Chesapeake in trust, to persons not directors or employees of Alleghany; or of the further acts to eliminate all interrelationships between Chesapeake and Alleghany. By order of April 6, 1954, the Commission found that the information so far developed, did not comprise sufficient grounds for the institution of the investigation requested, and denied the request, specifically stating that the action did not constitute a determination of the propriety or legality of any acquisition of control of Central or the Central system or of any interlocking directorates in connection therewith.

On April 6, 1954, a proceeding assigned Docket No. 31535, was filed by Central in the form of a petition under section 5(d) of the Administrative Procedure Act, for a declaratory order ruling the acquisition of Central's stock by or for Alleghany, and the announced and prospective plans by Alleghany and Robert R. Young, chairman of its board of directors, and Allan P. Kirby, its president, to control Central and the carriers of its system, would constitute the acquisition of control of more than one carrier

subject to the Act, in violation of its section 5(4), unless approved by us upon an appropriate application. The petition was supplemented April 13, 1954, and was joined in on April 22, 1954, by Harold S. Vanderbilt, a director of Central and owner of 60,000 shares of its stock. By order of May 11, 1954, a protective committee for several of the leased lines of Central and their bondholders was permitted to intervene.

Alleghany replied on April 16, 1954, and denied that the election and seating of its nominees on the board of directors of Central would constitute the control of two or more carriers in a common interest as prohibited in section 5(2) of the Act. It argued that any declaratory order as requested would interfere with the stockholders' right to select its management. Oral argument was heard by the Commission, and, on May 18, 1954, in the exercise of its discretion, the Commission denied the petition on the grounds that to do otherwise would not advance justice.

On May 7, 1954, the individuals comprising the protective committee of Central's leased lines and bondholder creditors, who on that date also intervened in Docket No. 31535, mentioned above, filed a complaint under section 5(7) of the Act, assigned Docket No. 31530. The complainants alleged that Alleghany and Chesapeake, with Young, Kirby, Richardson, Murchison, and Cyrus S. Eaton, chairman of the board of directors of Chesapeake, were participating in accomplishing or effectuating the power to manage Central and Chesapeake in a common interest, and have such power; that Alleghany together with the individual defendants, through ownership or control of voting power of over 1,000,000 shares (more than 17 percent) of Central's outstanding stock, had acquired the power to control Central and two of its principal affiliated carriers. The complainants requested a hearing and investigation of the defendants leading to an order that they desist from the complained of violations of section 5(4). On May 13, 1954, Central was permitted to intervene. Answers and motions to dismiss were filed separately by Chesapeake and Eaton, by Murchison and Richardson, and by Alleghany, Young,

and Kirby, and on June 11, 1954, the complainants and Central filed replies to the motions to dismiss. On August 12, 1954, the complainants petitioned for leave to withdraw the complaint in view of the pleadings entered by Alleghany in reply to the order to show cause issued by us in Finance Docket No. 14692, and by letter dated August 17, 1954, Central asked leave to withdraw its petition for intervention. An order was entered vacating and setting aside the order of May 13, 1954, and dismissing the complaint of the protective committee and the petition of Central.

During the interval that the foregoing petitions and complaint were pending, attorneys and officials of Alleghany and Chesapeake asserted several times that Alleghany had disposed of its holdings of Chesapeake stock, and had taken various positive steps to divest itself of control of the Chesapeake system. In that circumstance, by order of June 22, 1954, we requested Alleghany to show cause on or before July 15, 1954, why the order of June 5, 1945, in Finance Docket No. 14692, should not be vacated and set aside insofar as it applies to and provides that Alleghany shall be considered as a carrier subject to certain portions of the Act, unless and until otherwise ordered. On June 29, 1954, Alleghany requested that we postpone any determination of withdrawal of Alleghany's status as a carrier under the Act, and that it be permitted until October 1, 1954, to respond to this aspect of the show cause order. We denied that request.

On July 14, 1954, Alleghany responded to the order to show cause and stated it would be ready at a proper time to accept an order terminating its control of Chesapeake, and requested that action regarding Alleghany's status as a carrier be withheld until Central, Alleghany, Big Four, and Jeffersonville complete preparation of, and file an application under section 5(2) for authority, among other things, to merge the properties of the latter two, and through control of Big Four, for the first two to control the properties of Jeffersonville. For the reason that the relationship of Alleghany to Central and the other carriers, in connection with the proposed transactions was alleged

to be almost exactly parallel to Alleghany's relationship to Chesapeake at the time the *Chesapeake case* was determined, Alleghany urged that approval of the new application would require continuation of its status as a carrier subject to the Act. On July 23, 1954, we ordered action on the show cause withheld for 60 days to permit the filing of the joint application.

Jurisdiction under the Interstate Commerce Act.—Section 5(2)(a) of the Act, among other things, provides that it shall be lawful, with approval and authorization of this Commission, as provided in subdivision (b) thereof, for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise. Section 5(2)(b), among other things, provides that when a transaction is proposed under subparagraph (a) the carrier or carriers or persons seeking authority thereunder shall present an application to the Commission, and if it finds the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, the Commission shall enter an order approving and authorizing the transaction, subject to such terms and conditions and such modifications found to be just and reasonable. Our jurisdiction to approve and authorize control by Alleghany of Central and its related carriers, or of the properties of Central or its system carriers, must depend upon whether Alleghany is a carrier or a person as described in section 5(2), and whether the proposed transaction is within the scope of subparagraph (a).

The decision in the *Chesapeake case*, subject to certain conditions, among other things, announced that unless and until otherwise ordered, Alleghany shall be considered as a carrier subject to the provisions of the Act relating to reports, accounts, etc., and the issues of securities and assumptions of liability of carriers, to the same extent that

those provisions are applicable to Chesapeake and its carrier subsidiaries and affiliates. Without our further order, the voluntary action of Alleghany on and after January 19, 1954, divesting itself of its stockholdings and control of Chesapeake, and removing from deposit in the voting trust agreements, the controlling holdings of other carriers' stocks and disposing of such holdings, could not operate to alter the status of Alleghany as a carrier subject to the Act.

The foregoing analysis is premised upon the theory that Alleghany's status as a carrier cannot be modified or otherwise altered unless and until we order an appropriate change. To find otherwise would disregard the language of the report and order in the *Chesapeake case*. We believe the situation, so far as our jurisdiction is concerned, would be no different had Alleghany ceased to be a carrier subject to the Act at some time prior to the election by the stockholders of Central of the slate of nominees proposed by Alleghany. Under those circumstances, it would have been a person not a carrier under the Act, and our jurisdiction over its acquisition of control of Central and its subsidiaries would attach under section 5(2)(a), only if it involved two or more carriers subject to the Act. The failure of Alleghany to request authorization specifically to control these carriers would make the application under consideration incomplete, and we would be obliged to limit our authorization accordingly.

The Central system includes many individual carriers which are controlled by Central through stock ownership or otherwise. We long have recognized under section 5, that railroad systems are comprised of two or more carriers, and that control of a single system may not lawfully be effectuated without our approval and authorization.[2] That

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[2] For example, see *Seaboard Air Line Ry. Co. Receivership*, 261 I. C. C. 689, 717. *New York S. & W. R. Co. Reorganization*, 282 I. C. C. 801, not printed in full. *Arkansas & L. M. Ry. Co. Control*, 282 I. C. C. 254, 260. *Weinstein—Control—Capital Transit Co. and Montgomery*, 56 M. C. C. 127, 131. *Stoughton—Control—Delaware Coach Co.*, 57 M. C. C. 456. *Kittrell—Control—Dixie Motor Coach Corp.*, 37 M. C. C. 91.

principle is considered basic, almost as a definition. So much so, that the question of acquisition of a carrier system has never been contested before the Commission, and as far as we know, there have been no court decisions touching on that issue. Nevertheless, because of the stress which Alleghany places on this point, some discussion thereof is necessary.

During and following the argument before the Commission on May 14, 1954, in Docket No. 31535, counsel for Alleghany contended that the acquisition by Alleghany of stock of Central, and the election of directors of Central as proposed by Alleghany, would not result in the effectuation of control of two or more carriers in a common interest within the meaning of section 5(2) of the Act. This, they premise on the theory that Central and its related carriers constitute a single carrier already in existence as a system, control of which Alleghany may lawfully acquire without our specific authorization.

In Docket No. 31535, hereinbefore reviewed, the Commission in its discretion, on May 18, 1954, entered its order refusing the request for a declaratory order. The Commission did not specify in that order whether the nature of the relief sought was not appropriate, or whether the facts alleged in support thereof had been found not to merit the relief requested. The order cannot be considered any indication of a conclusion by the Commission that the Central system is or is not more than one carrier under the terms of section 5 of the Act. Actually, the order of May 18, 1954, constitutes only a denial of the request for a declaratory order.

In what appears to be an inconsistency, Alleghany's counsel also argued that because Alleghany (a noncarrier railroad holding company), has control of a major railroad system, it should continue to be considered as a carrier subject to our jurisdiction. That conclusion could be justified under the Act, only on the grounds that Alleghany controls more than one carrier subject to the Act.

Among its other arguments, Alleghany's suggestion that a decision contrary to its views would result in

requiring approval by us whenever a board of directors of a carrier corporation is replaced by the stockholders' election, also is untenable. To reason thus ignores the distinction between election of individuals as directors and control of the board of directors. The latter situation seems to have arisen when Alleghany, through the ownership of stock and the naming of a board of directors of its own choosing or otherwise, assured itself of control of the board of directors of Central and its related carriers. As a consequence, a holding company and those in control thereof, admittedly acquired control of a carrier which controls subsidiary carriers. In our opinion the Congress sought to prohibit that type of acquisition of control, unless approved and authorized by us upon consideration of an application, and upon our finding that the proposal would be consistent with the public interest.

In coming before us for authorization, Alleghany must be understood to have decided that it is either a carrier which has acquired control of one or more carriers through ownership of its stock or otherwise, or a person which is not a carrier which has acquired control of two or more carriers through ownership of their stock or otherwise. These conditions of status are exclusive of each other and cannot simultaneously characterize an individual or an entity. Therefore, for purposes of determining our jurisdiction in this proceeding, it is unnecessary to determine which of the two personalities applies to Alleghany.

Scope of authorization involved.—The applicants herein contend that the existing relationship between Alleghany and the Central system, in all material respects, is identical to the relationship existing in 1945 between Alleghany and the Chesapeake system. However, unlike the request in the *Chesapeake case,* the authority now requested involves only our approval of the proposed change in the manner of control of the properties and franchises of Jeffersonville. Central and Alleghany are said to join as applicants solely because the proposed transaction will change the control of Jeffersonville's properties through stock ownership, to

control through merger. The application in the *Chesapeake case* differed from the present application in that the earlier request as supplemented, showed that Alleghany then controlled carriers subject to the Act in addition to those included in the Chesapeake system, and differs also in that Alleghany at that time requested our authorization to control Chesapeake and its related carriers, and to change the manner of control of a carrier subsidiary to Chesapeake.

The present application is filed on the theory that the internal rearrangements of the applicants' corporate structure require the filing of an application, as determined by the Supreme Court in *United States* v. *Marshall Transport Co.*, 322 U. S. 31, and by us in *Nicholas, Fayette & Greenbrier R. Co. Lease*, 261 I. C. C. 546, and other cases. The supplement to the present application, filed December 6, 1954, repeats statements by Alleghany that it controls Central and its related carriers, and by letter dated December 15, 1954, counsel for Alleghany emphasizes that the supplemental application was filed only to supply information to aid our determination of the proposed merger and the continuation of Alleghany's status as a carrier under section 5 of the Act. Alleghany's intention is clearly shown as not to include a request for authority to control Central and the carriers of its system. Alleghany was stated to be of the opinion that the request to control Jeffersonville through merger, while continuing control of Central and its subsidiaries (obtained by Alleghany in June 1954 as a result of a proxy contest) fully complied with the requirements upon Alleghany under section 5 of the Act. Further, Alleghany contends that the application as amended complies with section 5(3), and requires that Alleghany's status as a carrier be continued.

Undoubtedly, the application herein was prepared and presented according to the applicants' best interpretation of requirements under section 5 of the Act. To the extent that the applicants propose specific changes of aspects of control of carriers and their properties, we will examine its contents on the merits. If we find that the proposed

transactions, as part of Alleghany's program, are within the scope of subparagraph (a), and that they will be consistent with the public interest, we will grant the application. Of course, our order of approval and authorization will be entered subject to whatever terms, conditions, and modifications we deem just and reasonable.

Position of the Securities and Exchange Commission.— On September 24, 1954, S. E. C. was permitted to intervene in the show cause proceeding in Finance Docket No. 14692, for the limited purpose of filing therein a memorandum dated September 14, 1954, suggesting that we terminate our order of June 5, 1945, insofar as it finds Alleghany to be as a carrier subject to specified provisions of the Act, and that we decline to enter any new order having the same effect. As shown previously, the S. E. C. intervened to the same extent in the application under consideration herein. S. E. C., on July 7, 1954, instituted a proceeding, its file No. 811-338, to determine whether its order of October 4, 1945, should be revoked, suspended or modified in view of Alleghany having divested itself of control of Chesapeake. By order of October 18, 1954, the S. E. C. postponed further action therein pending any revocation, modification, or suspension by us of the order of June 5, 1945, in the *Chesapeake case.*

The memorandum shows that on November 1, 1940, Alleghany registered under the investment act as a closed-end non-diversified management investment company; that at the end of 1940, it had total assets valued at $96,553,000, of which more than 95 percent was in railroad and allied securities (including, at market value, $80,000,000 in Chesapeake); that prior to October 4, 1945, Alleghany's railroad securities (including about 38 percent in Chesapeake) totaled $83,000,000, or 86 percent of its total assets; and that Alleghany controlled Chesapeake by ownership of about 600,000 shares of its common stock. In contrast, Alleghany's financial statements of July 31, 1954, are said to show that Alleghany sold its remaining 104,854 shares of Chesapeake stock for $3,600,000; that it had $7,500,000 invested in com-

mon stock of Central, and $7,500,000 in notes receivable under joint venture agreements covering additional shares of Central stock; that only about 16 percent of Alleghany's $67,000,000 assets are invested in railroad stock; and that about 24 percent or $16,000,000 is invested in Investors Diversified Services, herein referred to as I. D. S. of whose voting power Alleghany owns 70 percent. I. D. S. is an investment company controlling other investment companies. It has assets of $257,000,000, and owns, manages, or sponsors three face-amount certificate investment companies, and four open-end investment companies with combined assets of over one billion dollars. Based on the foregoing developments since 1945, the S. E. C. concludes that Alleghany's investment portfolio has practically reversed itself, and that Alleghany no longer should be deemed a carrier subject to the Interstate Commerce Act, but as an investment company subject to regulation under the investment act.

The S. E. C. contends that Alleghany is an "investment company" because it is engaged primarily in the business of investing, reinvesting, or trading in securities within the meaning of section 3(a)(1) of the investment act. In proof thereof, S. E. C. submits the number of issues of securities held by Alleghany at the end of each year from 1945 through 1953 (ranging from 66 in 1945 to 20 in 1948 and 1949); the number of issues purchased and sold during those years (ranging from 8 purchases in 1948, and 5 sales in 1945 and 1952, to 27 purchases in 1946, and 28 sales in 1953), and annual expenditures of from $5,776,547 to $26,572,116, and proceeds of from $770,423 to $32,455,608. The S. E. C. also asserts that if there is doubt of the activities of Alleghany, its owning or holding of the securities of Chesapeake and I. D. S. for substantial periods gave those holdings the characteristics of "investment securities" as defined in section 3(a)(3), even though Alleghany had control of those companies.

The S. E. C. states that annual reports and other information filed with it after October 4, 1945, disclose a number

of transactions involving Alleghany, which would have required prior approval or exemption under the investment act, or might have been prohibited, if Alleghany's registration as an investment company had not been interrupted. The memorandum cites in considerable detail various examples of such transactions and specifically designates the section or sections of the investment act which it states would have been violated if applicable.

The memorandum quotes and discusses section 5 of the Interstate Commerce Act, under which we have the power to regulate the corporate structure and financial practices of holding companies which control subsidiary carrier companies, and to order their compliance with certain enumerated sections of the Act, as safeguards to the subsidiaries concerned and to the public interest. In view of these powers, the S. E. C. suggests that the substantive provisions of the investment act would provide sufficient assurance of stockholder and public protection, and compliance with the underlying objectives of the Interstate Commerce Act, to permit the exercise of our discretion under section 5(3), not to subject Alleghany to the presently applicable sections of the Act. The application of certain provisions of the investment act to investment companies such as Alleghany, the S. E. C. contends, will provide adequate protection against over-capitalization and imbalance between the company's debt and preferred stock, and its common stock equity. The S. E. C. points out that the exercise of our discretion, as suggested, would not relieve Alleghany or any other person from compliance with section 5(2) of the Act, regarding the approval or denial of control of carriers.

In its reply, filed October 14, 1954, supported by a separate memorandum from Central in reply to the memorandum of the S. E. C., Alleghany argues that to follow the suggestions of the S. E. C. would severely hamper the desired financing and operation of Alleghany and Central and its subsidiary carriers. Based on the present proceeding being identical in all pertinent and material respects with the facts and proceedings in the *Chesapeake*

case, Alleghany contends that under that precedent, we are required to find Alleghany to be a carrier subject to the enumerated provisions of the Act, to the same extent as in the order of June 5, 1945, and that to do otherwise would cause conflict and confusion. The replies deny that any of Alleghany's transactions in securities which we considered and approved were contrary to the best interests of the public investors whom the investment act seeks to protect.

Alleghany asserts that section 5(3) of the Act makes it mandatory that a holding company which controls a sizeable rail carrier shall be regulated by us, and that the only criterion is whether the noncarrier person controls a major railroad system. On the contrary that section provides merely that to the extent indicated in our order authorizing control of one or more carriers under section 5(2) of the act the holding company shall be subjected to the various sections of the Act enumerated. The Alleghany shows that it has been changing its investments back to rail securities, such as by the acquisition, since August 31, 1954, of additional shares of Central stock costing $181,707, and other rail securities at a cost of $1,766,346; that its present investments are 52 percent in rail securities; and that as soon as practicable, it will divest itself of nonrail securities until its total investments, excluding Government bonds, will be not less than 75 percent in rail securities. The latter program is said to contemplate the issuance by us of an order requiring trustee arrangements for Alleghany's holdings of rail stocks outside the Central system.

Regarding the holdings by Alleghany of I. D. S. securities, the reply points out that the latter company is completely under the jurisdiction of the S. E. C., and that Alleghany being subject to the same regulation would in no manner increase its regulation of I. D. S. Alleghany contends that its public investors have benefitted since being regulated by us; that the S. E. C. failed to intervene or make any representations in the transactions approved by us since 1945; and that the S. E. C. apparently is seeking

to amend the laws involved and to ignore the exclusive and plenary authority over carriers which the Congress has conferred upon us. In conclusion, Alleghany asserts that we have jurisdiction over holding companies which we authorize to control one or more railroads; that Alleghany has had that status for more than 9 years; and that Alleghany's primary business is to invest in railroad securities. Therefore, Alleghany urges that its status as a carrier should not be changed.

Supplemental memorandum of S. E. C. and reply thereto. —By order dated December 20, 1954, S. E. C. was permitted to enlarge its limited intervention herein to admit the filing of a supplemental memorandum dated December 14, 1954. S. E. C. states that this memorandum, which is in the nature of a reply to Alleghany's reply, is filed "to clarify several significant issues" which show that neither section 5(3) of the Act, nor prior decisions thereunder require the continued regulation of Alleghany as a carrier.

The concern of the Interstate Commerce Commission and the Congress prior to the enactment of section 5(3) is stated by S. E. C. to have been to prevent the use of the railroad holding company device to effectuate consolidation of railroad systems without regard to the Act and the public interest; that the anticipated control of the railroad holding companies was in relation only to their character to that extent, as opposed to their character as investment companies; and that Alleghany had been cited as a "striking illustration" why section 5 needed amending, because, unlike now, it then engaged almost exclusively in the transportation business by means of control of carriers whose securities constituted almost all the company's assets. Further, S. E. C. shows (by footnote) that during the period of almost 5 years prior to October 1945, while Alleghany was registered under the investment act, it filed only one application to engage in a transaction requiring S. E. C. consideration, but in recent years, a number of transactions engaged in by Alleghany would have required S. E. C. consideration, if Alleghany had remained subject to the investment act.

In a second section of the supplemental memorandum, S. E. C. cites various previously discussed sections of the investment act, to show that the regulation of Alleghany under that law would best serve the public interest and need not lead to any conflict between S. E. C. and the Interstate Commerce Commission. Based upon the conclusion that the primary nature of Alleghany's business presently is in the investment field rather than in transportation, S. E. C. reiterates its statement that public investors in Alleghany should be afforded the safeguards which Congress established for their protection by passage of the investment act, and which are unlike the safeguards contained in the Interstate Commerce Act. The S. E. C. asserts that we should not decide which agency should regulate Alleghany on the hypothetical future situation which Alleghany states will arise when it changes its investment portfolio to contain predominantly rail securities, because if the prospective carrier holdings do not involve control, or if they are to be placed in trust, the holdings would represent investments only, and Alleghany would remain in the position of an investment company—not that of a carrier.

Alleghany filed its reply to the supplemental memorandum of S. E. C. on December 31, 1954. According to the reply, S. E. C. is suggesting that we ignore the intent of the Congress when it enacted section 5(3) of the Act, and section 3(c)(9) of the investment act. Alleghany denies that any facts relating to its investments in, and control of, non-carrier companies, the fluctuations in the percentage of its holdings in railroad and nonrailroad securities, the relationship of funds invested in railroad securities now as compared to any previous period or date, or the degree of its activity in trading railroad or other securities, can operate to transmute Alleghany in character from a "railroad holding company" to an "investment company." The former is defined as a company which not only invests in railroads, but exercises control of them; and the latter is defined as a company which assumes none of the responsibilities of management and control of the companies whose securities it holds. Alleghany contends that this distinction was

recognized in the recommendations occurring in the considerations of the Congress, which led to the enactment of section 5(3); and that the Congress then had no interest in regulating investment companies which held only railroad securities, but, prescribed regulation by this Commission of companies which controlled one or more railroads.

Regarding the second portion of the supplemental memorandum, Alleghany contends that any duality of jurisdiction exercised by this Commission and S. E. C. would result in conflict and confusion regarding any corporate action by Alleghany; that since Alleghany has been considered as a carrier subject to the Interstate Commerce Act, S. E. C. has refrained from applying the investment act provisions to Alleghany, and has failed to intervene in any transaction submitted for this Commission's consideration; and that the vast improvement in the status of Alleghany's security holders since 1945 is evidence that regulation by this Commission has protected and furthered the interests of the public investors. In conclusion, Alleghany requests us to disregard the position of S. E. C. in this proceeding. Alleghany also requests that the applications herein be granted at the earliest possible date, because certain financial transactions important to Alleghany and Central are being delayed to the prejudice of both corporations and their respective security holders.

We have considered the representations and rebuttal herein concerning the proper Governmental agency to exercise regulatory jurisdiction over a specified type of investment company. It appears to us, as it does to Alleghany, that S. E. C. primarily is interested in achieving some degree of alteration of the effect of certain provisions of the Interstate Commerce Act and the Investment Company Act of 1940. Such a result, in our opinion, must be accomplished by amendatory action of the Congress of the United States. Except that we have the power to impose just and reasonable conditions, we are bound to apply the provisions of the Interstate Commerce Act in the manner we consider best protects the interest of the public in the field of transportation in interstate commerce. We have no dis-

cretionary power to yield our jurisdiction to any statutory agency. The S. E. C. has not offered for our consideration any specific terms or conditions to be imposed as a matter of protecting the public interest, in the event we should determine that Alleghany continue its status as a carrier subject to the Act.

We recognize that the present control of the Central system has passed to Alleghany by regular corporate procedures even though our approval in the premises has not been sought. Accordingly, its influence on the national transportation system which we regulate is immediate in effect and wide in scope. We do not think that we should deprive ourselves of information necessary to the regulatory process and of value to the public generally with respect to a concern playing such an important role in transportation. In our opinion the diversification of Alleghany's holdings as between railroad and nonrailroad or noncontrolled railroad securities is not of substantial importance. The important thing is that Alleghany does control one of our largest railroad systems and the regulation thereof in the public interest is our responsibility. In addition to Alleghany we have heretofore subjected other holding companies to the provisions of sections 20 (1) to (10) and section 20a (2) to (11); namely, the Pennsylvania Company, *Wabash R. Co. Control*, 247 I. C. C. 365, decided July 29, 1941; the Delaware and Hudson Company, *Delaware & H. R. Corp. Debt Adjustment*, 254 I. C. C. 339, decided March 24, 1943; and the Atlantic Coast Line Company, *Atlantic Coast Line R. Co. Purchase*, 261 I. C. C. 820 (not printed in full), decided December 12, 1945. Reasons dictating the necessity for making the foregoing holding companies subject to the Act for the purposes stated in section 5(3) were not different than those existing with respect to Alleghany's control of Central. While not of controlling importance there were certain similarities to the Alleghany. The Atlantic Coast Line Company had been held by the S. E. C. to be a closed-end investment company within the meaning of the Investment Company Act of 1940. There was considerable diversification in the investment

portfolio of the Delaware & Hudson Company. In *Delaware & H. R. Corp. Debt Adjustment, supra,* page 242, we pointed out that after transfer of the railroad activities to a new company the Delaware & Hudson Company would become a holding company with assets represented by stocks of railroad, coal, mining, steamboat, and hotel companies. The record also shows that Alleghany's investment portfolio for the future probably will consist primarily of railroad securities.

For the reasons stated we think that we are warranted in continuing Alleghany in its present status. Accordingly, we will, pursuant to section 5(3), subject Alleghany to the provisions of section 20 (1) to (10), inclusive, and section 20a (2) to (11), inclusive, of the Interstate Commerce Act. In the event that future circumstances warrant any change or modification of this finding, we retain jurisdiction to enter any order we deem necessary to protect the public interest.

The proposed merger.—Effective as of December 31, 1954, upon our approval and authorization, the properties and franchises of Jeffersonville will be merged into the Big Four for ownership, management, and operation in accordance with a proposed formal agreement of merger dated September 14, 1954, copy of which is made part of the application. In consideration for the transfer of the railroads, properties, interests, rights, privileges, and franchises (except the franchise to be a Kentucky corporation), the Big Four will assume the contracts, deeds, obligations, liabilities, and duties of Jeffersonville, and the shares and certificates of its capital stock will be canceled. All intercompany indebtedness and contractual obligations will be extinguished without the impairment of the rights of third parties. No securities are to be acquired by any of the applicants in consummating the proposed transaction, and the capitalization of the Big Four will not be affected. The Big Four, as the surviving corporation, as at present, will remain a corporation of Ohio and Indiana. The properties of Jeffersonville, after the merger, will be operated by

Central as part of the owned lines of railroad of Big Four, under the after-acquired property provisions of an existing lease.

The applicants, in effecting the merger, will observe to the full extent required by section 5(11) of the Act, and as far as practicable otherwise, the requirements of State law, particularly as regards procedure, notice of stockholders' meetings, form of merger agreement and the filing thereof in the offices of the respective Secretaries of State. They do not propose to request approval of State Commissions or to make the taking of effect of the merger dependent upon the filing thereof in State offices. Compliance with certain laws of Kentucky in the applicants' opinion would defeat the purpose of the merger; namely, the simplification of the corporate structure of the Big Four portion of the Central's system, and also would involve needless expense and impose an unnecessary burden on interstate commerce. This they say would be neither in the public interest nor consistent with the national transportation policy. The Kentucky laws provide that corporations of any other State may not possess, control, maintain, or operate a railroad in Kentucky, unless they first file an acceptance of the State constitution and become a domestic corporation of Kentucky;[3] that when a Kentucky corporation consolidates with a corporation of any other State, it does not thereby become a foreign corporation as to Kentucky; and that charter papers, including mergers, in order to become effective, must first be filed with the office of the Secretary of State.

In support of their request for relief from such restrictive State laws, the applicants cite, among other decisions, *Schwabacher* v. *United States*, 334 U. S. 182, 194-5, in which the Supreme Court found that in cases of merger under section 5 of the Act, State laws and charters must yield to the Interstate Commerce Act, and that approval of a voluntary railroad merger under the Act is dependent primarily upon two particular considerations specified in

[3] Kentucky Constitution, section 200, and Kentucky Revised Statutes, sections 277.020, 277.110, 271.465 *et seq.*

paragraph (2)(b), and another in paragraph (11) of section 5. The Court then stated, "When these conditions have been complied with, the Commission-approved transaction goes into effect without need for invoking any approval under state authority, . . ." In connection with the merger proposed herein, we need make no specific findings or prescribe any conditions other than those required by the Act, in order to afford the applicants the relief they request from the applicability of the State laws.

The lines of railroad of the Big Four, including those of the Peoria & Eastern Railroad Company and the Central Railroad Company of Indianapolis, include 2,007.56 miles of main line and 244.57 miles of branch line, total 2,252.13 miles, radiating from Indianapolis, Ind., to points in Indiana, Ohio, Michigan, and Illinois. The lines of the Peoria & Eastern Railway aggregate 201.53 miles of main line and no branch line. The Central Railroad of Indianapolis consists of 1.94 miles of yard switching tracks in Indianapolis. The lines of the Jeffersonville extend 2.70 miles from Jeffersonville, Ind., where it connects for the interchange of traffic with the Pennsylvania Railroad and the Baltimore & Ohio Railroad, to Louisville, Ky., where it connects with the Louisville & Nashville Railroad, the Illinois Central Railroad, and the Chesapeake. With its yard tracks and sidings, it comprises about 23 miles of track. The Big Four does not physically connect with the Jeffersonville, but under trackage rights over the Baltimore & Ohio, operates from Mount Vernon, Ind., to Jeffersonville, 52.21 miles. The trackage rights are used by Central as lessee of the Big Four properties.

The final valuation of the properties, less working capital, of Big Four and Jeffersonville, as of June 30, 1915, found by us for rate making purposes in Valuation Dockets Nos. 264, and 178, respectively, were (Big Four figures shown first) $141,776,640, $2,850,000; investment in roadway and equipment as of the same date $144,375,812, $4,103,987; and value of additions and betterments since the date of valuation to June 30, 1954, $188,699,640, and

$2,463,989. The property of Jeffersonville is not encumbered by any mortgage or similar indenture. However, parts of the property are subject to trackage rights in favor of Big Four and Chesapeake. The trackage rights of Big Four are subject to its refunding and improvement mortgage dated June 27, 1919, and Central's interest therein is subject to its refunding and improvement mortgage dated October 1, 1913. Both mortgages permit the modification or termination of the trackage rights.

The general balance sheet of Jeffersonville of June 30, 1954, shows investments (cents omitted) $5,089,398, after deduction of $1,549,915 accrued depreciation and $2,006 donations and grants; current assets $352,770, including among other items $124,791 cash, and $115,230 miscellaneous accounts receivable; unadjusted debits (prepayments) $46; total assets $5,442,215; liabilities—capital stock $1,425,000; long-term debt $7,365,000; current liabilities $302,368; including among other items, $161,896 interest matured unpaid; deferred liabilities $12,097, unadjusted credits (insurance reserves) $3,748, earned surplus $3,665,998 (debit), of which $2,876 is appropriated, and $3,668,874 (debit) is unappropriated.

The proposed merger will effect savings by the elimination of the cost of maintaining Jeffersonville as a separate entity with the attendant expenses of directors and stockholders' meetings, savings in accounting and other expenses, and elimination of various reports to regulatory agencies. The time of officers and employees of the offices of the secretary, accounting, law, and treasury departments of the Jeffersonville, presently devoted to its affairs, may be directed into productive channels so as to enable the realization of savings. No change in traffic and gross revenues is expected to result from the merger as there will be no substantial change in the operations.

Modification of lease.—The properties of Jeffersonville which Big Four will acquire pursuant to the merger proposed herein will be operated by Central as part of the owned lines of Big Four, under the terms and during the remainder of the effective period of a lease of January 2,

1930. That lease was entered into pursuant to reports of the Commission in *New York Central Unification, supra,* dated January 14, 1929, (150 I. C. C. 278), and July 2, 1929 (154 I. C. C. 489).[4] Its terms and conditions were modified by supplemental leases described in reports dated July 12, 1937 (221 I. C. C. 573), and December 30, 1942 (254 I. C. C. 837), not printed in full. A confirmatory supplemental lease approved by us June 17, 1938, in *Cleveland, C. C. & St. L. Ry. Co. Merger, supra,* (228 I. C. C. 240), gave effect to the merger of eight related carrier corporations into Big Four.

Big Four as lessor and Central as lessee present a draft of a confirmatory supplemental lease pursuant to which the properties of Jeffersonville, when acquired through the proposed merger, are to be included in the *res* of the lease of January 2, 1930, as supplemented. The supplemental lease also includes all rights, titles, and interests of the lessor in the use of certain other railroad properties under grants to Jeffersonville in common with other carriers, including trackage rights for the use of properties of Jeffersonville pursuant to an agreement dated January 1, 1927,[5] and, for the term of the lease, Big Four's interest in holdings of capital stock and bonds of certain companies, including the outstanding 14,250 shares of capital stock of Jeffersonville. In consideration for the inclusion of the affected properties, the supplement provides that Central will release to Big Four all its interest in the shares of stock of Jeffersonville, so that they may be canceled. The Lease of the property acquired under the merger herein, is subject to all mortgages, liens, encumbrances, charges, and obligations affecting the properties involved. The confirmatory supplemental lease will be effective from its date, for and during the term, and upon the terms and conditions provided in the initial lease as amended.

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[4] In *New York Central R. Co. Assumption,* 158 I. C. C. 317, decided December 2, 1929, we authorized Central as lessee, to assume obligation and liability in respect of securities under provisions of the then proposed lease of properties of Big Four.

[5] See *Control of L. & J. Bridge & R. R.,* 145 I. C. C. 131.

Conclusions and findings.—Of the conclusions upon which our findings enumerated below are founded, some have been set forth and discussed in relation to the various topics of this report. Other conclusions yet require our attention.

The only remaining effective portion of our approval and authorization contained in the report and order of June 5, 1945, in the *Chesapeake case,* is that in respect to Alleghany being subject to certain sections of the Act. For the reason that the *Chesapeake case* order required only the filing of quarterly reports to show which securities held by Alleghany and Chesapeake were deposited in the voting trusts provided for in the report and order, no order by us presently is necessary to effect the expiration or termination of the trusts. Upon the issuance of the order in Finance Docket No. 18656, Alleghany will continue to be considered as a carrier subject to the Act, through the vehicle of the Central system in lieu of through the Chesapeake system, and that section of the presently effective portion of the order of June 5, 1945, will be superseded. At that time, the show cause order of June 22, 1954, will become moot.

Alleghany owns securities of the Missouri Pacific Railroad, as shown hereinbefore, but the voting power attached to the ownership thereof is divorced from the securities, and will remain so until a reorganization plan, approved by us and the Court having jurisdiction over the bankruptcy proceeding is formally adopted, consummated, and authorized, or if the proceeding is appropriately otherwise terminated. It is our view that if and when Alleghany obtains voting securities of the corporation succeeding the present Missouri Pacific Railroad Company, Alleghany will be required to deposit those securities with an independent trustee nominated by Alleghany and approved by the Commission.

The foregoing provision for an independent voting trustee is not to be construed as giving advance approval or waiving in any manner the requirements of section 5(2) of the Act with respect to acquisition of stock by

Alleghany whereby it may acquire, accomplish, or effectuate direct or indirect control, or management in a common interest, of any additional carriers subject to the Act. Presumably, when such situations arise in the future, Alleghany will comply with the provisions of section 5(2). In this connection, see *Alleghany Corp.* v. *James Foundation of New York,* 115 F. Supp. 282, and 214 F. 2d 446. Similarly, our powers under section 5(7), to investigate and determine whether Alleghany, or any company or person associated with Alleghany, is violating the provisions of paragraph (4) of section 5, remain intact. Any interlocking directorates not presently authorized by us under section 20a(12) of the Act, as between Alleghany or Central and its subsidiary and affiliated carriers on the one hand, and any other carrier subject to the Act, on the other, should be brought to the attention of the Commission for its consideration and approval.

Contentions not discussed in the report herein, and requested conclusions and findings based thereon, have been given consideration and were found without merit, or not justified in view of the decision and order herein.

The facts and circumstances, and our conclusions thereon, which we have reviewed hereinabove, support our opinion that approval and authorization of the transactions proposed by Alleghany and Central in conjunction with Big Four and Jeffersonville are justified. The changes in the form of the existing control of the properties and franchises of Jeffersonville will simplify the corporate structure of the Big Four division of the Central system. The end result will be increased efficiency and greater economy in the operation of the lines in question, by reduction of the number of system companies. The transactions will not affect transportation service to the public. No increase in total fixed charges will accrue, and no guaranty or assumption of the payment of dividends or fixed charges is contemplated. No other railroads have sought to be included in the transactions.

The applicants do not contemplate that there will be any reduction in the number of employees as a result of any of

the transactions herein. However, if conditions for the protection of employees are found to be necessary, the applicants request that they be imposed only to the extent required by the provisions of section 5(2) (f). Our authorizations herein will be subject to the same conditions for the protection of employees as prescribed in *Chicago & N. W. Ry. Co. Merger,* 261 I. C. C. 672.

Subject to the conditions for the protection of employees mentioned and the condition relating to deposit of specified railroad securities with an independent voting trustee, we find the following:

1. (a) That merger of the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by The New York Central Railroad Company and the Alleghany Corporation; and,

(b) That modification of the lease of January 2, 1930, under which The New York Central Railroad Company, lessee, operates the property of the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, lessor, to give effect to the merger described in (a), all as described herein, are transactions within the scope of section 5(2) of the Interstate Commerce Act, as amended, that the terms and conditions proposed are just and reasonable, and that the transactions will be consistent with the public interest.

And, as listed below, we further find:

2. That Alleghany Corporation shall be considered as a carrier subject to the provisions of section 20 (1) to (10), inclusive, and section 20a (2) to (11), inclusive, of the Interstate Commerce Act, as amended;

3. That effective portions of the order of June 5, 1945, in Finance Docket No. 14692, shall be terminated and be of no further force and effect; and

4. That jurisdiction herein shall be retained to make such further order or orders as hereafter may be necessary or appropriate.

An appropriate order will be entered herein, in which suitable provision will be made for the submission of journal entries and compliance with valuation order No. 24, dated May 15, 1928. The order also will provide that within 15 days after the execution of the agreements of merger and the confirmatory supplemental lease herein authorized, verified copies of those instruments shall be filed with this Commission.

APPENDIX

List of carriers referred to as included in or affiliated with the New York Central Railroad system.

Battle Creek & Sturgis Railway Company
Beech Creek Extension Railroad Company
Beech Creek Railroad Company
Boston & Albany Railroad Company
The Boston Terminal Company
The Boston Terminal Corporation
Calumet Western Railway Company
Cambria and Indiana Railroad Company
Central Indiana Railway Company
Central Railroad Company of Indianapolis
Cherry Tree and Dixonville Railroad Company
Chicago Junction Railway Company
Chicago, Kalamazoo and Saginaw Railway Company
The Chicago River and Indiana Railroad Company
The Cincinnati Union Terminal Company
The Cleveland, Cincinnati, Chicago and St. Louis Railway Company
The Cleveland Union Terminals Company
Dayton Union Railway Company
The Detroit, Hillsdale and South Western Railroad Company
Detroit Manufacturers' Railroad
Detroit River Tunnel Company
Detroit Terminal Railroad Company
Detroit, Toledo & Milwaukee Railroad Company
The Erie and Kalamazoo Railroad Company
Fort Wayne and Jackson Railroad Company
Fort Wayne Union Railway Company
The Hudson River Connecting Railroad Corporation
Illinois Northern Railway
Indiana Harbor Belt Railroad Company
The Indianapolis Union Railway Company
Joliet and Northern Indiana Railroad Company
The Kalamazoo, Allegan and Grand Rapids Railroad Company
The Lake Erie and Eastern Railroad Company

The Lake Erie and Pittsburg Railway Company
The Lakefront Dock and Railroad Terminal Company
Lansing Manufacturers Railroad
Lansing Transit Railway Company
Louisville & Jeffersonville Bridge and Railroad Company
The Mahoning and Shenango Valley Railway Company
The Mahoning Coal Railroad Company
The Mahoning State Line Railroad Company
Michigan Air Line Railroad Company
The Michigan Central Railroad Company
Mingo Valley Railroad Company
The Monongahela Railway Company
Montour Railroad Company
Mt. Gilead Short Line Railway
The New York and Harlem Railroad Company
The New York Central Railroad Company
Niagara Junction Railway Company
Nicholas, Fayette and Greenbrier Railroad Company
North Brookfield Railroad Company
The Owasco River Railway
The Peoria and Eastern Railway Company
Peoria & Pekin Union Railway Company
Pittsburgh and Clearfield Railroad Company
The Pittsburgh and Lake Erie Railroad Company
Pittsburgh, Chartiers & Youghiogheny Railway Company
The Pittsburgh, McKeesport and Youghiogheny Railroad Company
The Pittsfield and North Adams Railroad Corporation
The Providence, Webster and Springfield Railroad Company
Railway Express Agency, Incorporated
The St. Lawrence & Adirondack Railway Company
Shenango Valley Railroad Company
The Stewart Railroad Company
Terminal Railroad Association of St. Louis
The Toledo Terminal Railroad Company
Troy and Greenbush Railroad Association
The Troy Union Railroad Company
Union Depot Company (Columbus, Ohio)
Ware River Railroad Company
Youngstown & Southern Railway Company
The Zanesville Terminal Railroad Company

Document 8.

First Status Order.

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 2d day of March, A. D. 1955.

FINANCE DOCKET No. 18656

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY, MERGER, ETC.

FINANCE DOCKET No. 14692

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

Investigation of the matters and things involved in these proceedings having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, subject to the conditions for the protection of employees, and relating to deposit of specified railroad securities with an independent voting trustee referred to in the report aforesaid, (a) merger of the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for ownership, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by The New York Central Railroad Company and the Allegheny Corporation; and (b) modification of the lease of January 2, 1930, under which The New York Central Railroad Company, lessee, operates the property of the Cleve-

land, Cincinnati, Chicago and St. Louis Railway Company, lessor, to give effect to the merger described in (a) above, upon the terms and conditions in said report found just and reasonable, be, and they are hereby, approved and authorized.

It is further ordered, That unless and until otherwise ordered by this Commission, said Alleghany Corporation shall be considered as a carrier subject to the provisions of section 20 (1) to (10), inclusive, and section 20a (2) to (11), inclusive, of the Interstate Commerce Act, as amended, to the same extent that those provisions are applicable to The New York Central Railroad Company and its carrier subsidiaries and affiliates; *Provided,* that, as to the applicability of said provisions of section 20 and section 20(a) to said Alleghany Corporation, this order shall take effect and be in force on and after the date hereof, except that as to the provisions of section 20, pertaining to annual reports, it shall be deemed effective as of January 1, 1955.

It is further ordered, That the effective portions of the order of June 5, 1945, in Finance Docket No. 14692, Chesapeake & Ohio Railway Company Purchase, etc., be and they are hereby terminated and shall be of no further force and effect.

It is further ordered, That the jurisdiction of this Commission be, and it is hereby retained for the purpose of making such further order or orders herein as hereafter may be necessary or appropriate.

It is further ordered, That the Cleveland, Cincinnati, Chicago and St. Louis Railway Company shall report to this Commission as required by valuation order No. 24, effective May 15, 1928.

It is further ordered, That, if the authority herein granted is exercised, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company shall submit for the consideration and approval of this Commission, three copies of the journal entries required to record the transactions authorized herein.

And it is further ordered, That within 15 days after the execution of the agreements of merger and the confirmatory supplemental lease set forth in the report aforesaid, the Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and The New York Central Railroad Company, respectively, shall file verified copies thereof with this Commission.

By the Commission, division 4.

HAROLD D. McCOY,
Secretary.

(SEAL)

Document 9.

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 18656[1]

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

Submitted April 14, 1955 *Decided May 24, 1955.*

Upon consideration of petitions herein granted in part, previous order by division 4, approving and authorizing the merger of the properties of the Louisville & Jeffersonville Bridge and Railroad Company, and necessary corporate rearrangements related thereto; holding that Alleghany Corporation is a carrier subject to the provisions of portions of certain sections of the Interstate Commerce Act; and terminating effective portions of the order of June 5, 1945, in Finance Docket No. 14692, affirmed: Previous report I. C. C. , decided March 2, 1955.

Request for hearing denied.

Appearances as shown in prior report; also *Thomas G. Meeker*, and *Myron S. Isaacs* for Securities and Exchange Commission, *Joseph B. Hyman, George Brussel, Jr.*, for interveners, and *Randolph Phillips, pro se*, intervener.

Report of the Commission on Reconsideration.

By the Commission:

In this proceeding, by report and order of March 2, 1955, I. C. C. , division 4 approved and authorized

[1] Also embraces Finance Docket No. 14692, *Chesapeake & Ohio Railway Company Purchase, etc.* Previous reports 261 I. C. C. 239, and 271 I. C. C. 5.

merger of the properties and franchises of the Louisville & Jeffersonville Bridge and Railroad Company (Jeffersonville) into the Cleveland, Cincinnati, Chicago & St. Louis Railway Company (Big Four) for ownership, management, and operation, and through that company, continued control of the said properties and franchises by The New York Central Railroad Company (Central) and the Alleghany Corporation (Alleghany); modified the lease of January 2, 1930, between Big Four and Central respecting operation of the properties of Big Four; continued Alleghany under the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act (the act); terminated the effective portions of the order of June 5, 1945, in Finance Docket No. 14692; and retained jurisdiction to make such further order or orders as may be necessary or appropriate.

The Securities and Exchange Commission (S. E. C.) on April 1, 1955, filed a petition for reconsideration and reversal of the division insofar as it holds Alleghany to continue to be a carrier subject to provisions of the act under section 5(3). The petition reiterates the contentions submitted in S. E. C.'s memorandums filed September 14, and December 14, 1954, (discussed at length under appropriate headings in the division's report). Alleghany and Central filed replies to the petition.

A petition for rehearing and reconsideration was filed March 21, 1955, on behalf of Lewis D. Gilbert and John Gilbert, and Breswick & Company, seeking reconsideration of orders by division 4, dated February 9 and 15, and March 2, 1955, denying and dismissing their previously filed petitions for leave to intervene in the proceedings herein. In a joint petition with the said Gilberts filed March 28, 1955, one Randolph Phillips on his own behalf, requested leave to intervene in these proceedings and in Finance Docket No. 18866, *Alleghany Corporation Stock*, pending determination by the division, and to join in the petition for rehearing and reconsideration filed by the Gilberts; and on April 11, 1955, an amended petition for leave to intervene in the three proceedings was filed jointly by the

Gilberts, Breswick, and Phillips. The amendatory petition is premised upon an opinion dated April 6, 1955, rendered in *Breswick & Co.* v. *Alleghany Corporation,* (Civil Action 98-371) by the United States District Court, S. D. N. Y., which collaterally held that the interests of minority stockholders in proceedings under sections 5 and 20a of the act must be considered and protected by us. They request reconsideration and reversal of the report and order of March 2 and denial or dismissal of the application therein considered. They also request denial of application of Alleghany in Finance Docket No. 18866 for authority to issue stock. In the alternative they request that all of the proceedings be set for hearing. Alleghany filed replies to the petition on March 28, 1955, and to the amended petition on April 14, 1955.

For the purpose of giving consideration to their contentions with respect to the proceedings here under consideration, the Gilberts, Breswick & Co., and Phillips are permitted to intervene therein, and to be treated as parties to the record as of the date of this report.

For the reason that the interveners are concerned primarily with the interpretation of paragraphs (2) and (3) of section 5 of the act and their application to the facts disclosed in these proceedings, it is our opinion that there is no need to order a hearing. The petitions for reconsideration are granted and will be considered on the present record in view of the contentions of the interveners and of Central and Alleghany. We are in general accord with the ultimate conclusion of the division and believe it is supported by the facts. In discussing our views herein, only the more important facts pertaining to the issues raised in the petitions will be stated. Contentions not specifically discussed, and not treated in the division's report, have been given consideration and found to be without material significance or not justified.

The position of the S. E. C. goes primarily to the division having erred in finding that because Alleghany controls a sizeable rail carrier it is a "railroad holding company" subject to the act, rather than an "investment

company" whose regulation properly lies within the jurisdiction of the S. E. C. under the Investment Company Act of 1940. The S. E. C. argues that section 5(3) of the act provides us latitude to exercise discretion as to who should or should not be subject to the accounting, reporting, and securities regulations contained in the act. It submits that by collaborating with us, it could prescribe regulations which would satisfy the intent of the requirements of our act, and at the same time, protect the interests of the investing public by having Alleghany's activities regulated in the same manner as other investment companies. In reply, the applicants contend that the legislative history concerning the possible conflict of jurisdiction between the statutes administered by this Commission and by the S. E. C. shows that, as the expert agency in transportation matters, we are entrusted with the regulation of holding companies which manage and control the affairs of major rail carriers, and that section 3(c)(9) of the Investment Company Act is without ambiguity in stating:

> (c) Notwithstanding subsections (a) and (b) none of the following persons is an investment company within the meaning of this title:
>
> • • • • • •
>
> (9) Any company subject to regulation under the Interstate Commerce Act, or any company whose entire outstanding capital stock is owned or controlled by such a company: *Provided,* That the assets of the controlled company consist substantially of securities issued by companies which are subject to regulation under the Interstate Commerce Act.

Concerning our discretionary power as to whether a holding company should be considered as a carrier subject to the act, Alleghany submits that the discretion under section 5(3), namely, "• • • shall to the extent provided by the Commission in such order • • •", goes to whether the company in question shall be subject to some, but not all, the prescribed provisions of the act, and that any exercise of

discretion, by all standards, must be reasonable. It contends that the S. E. C. and its regulatory powers would not be prejudiced by continuation of Alleghany's status as a carrier subject to the act, (which has existed since 1945) in view of its recent acquisition of Central and its related carriers. Alleghany and Central both submit that any dual jurisdiction over Alleghany would adversely affect the operation of the railroad, and would be confusing and burdensome to its management.

We are not in accord with the suggestions of the S. E. C. As the division stated, we believe that unless Congress amends either or both of the statutes involved herein, the results which S. E. C. desires to achieve are not within our powers under the Interstate Commerce Act. The extent to which we may exercise any discretionary powers in this area has been determined by division 4 in policies developed since 1941, recited in *Wabash R. Co. Control*, 247 I. C. C. 365, *Delaware & H. R. Corp. Debt Adjustment*, 254 I. C. C. 339, and *Atlantic Coast Line R. Co. Purchase*, 261 I. C. C. 820 (not printed in full) decided December 12, 1945. In its criticism of the division's action, the S. E. C. has not undertaken to show upon what facts the situation now under consideration differs from the pertinent situation underlying each of the foregoing decisions. As shown by the division, the S. E. C. contentions rely largely in revealing facts which seem to contravene the proviso of section 3(c)(9) of the Investment Company Act relating to the controlled company's assets consisting substantially of securities of companies subject to the Interstate Commerce Act. In our opinion that section, read in context, provides a test for the S. E. C. to apply in determining whether such companies are or are not to be exempted from regulation under the Investment Company Act. The amount or kind of carrier investment is not controlling in our consideration of whether the company in control shall be considered within the jurisdiction of the Interstate Commerce Act. We concur in the findings that we should consider Alleghany as a carrier subject to the provisions of the act specified in section 5(3).

The common interest of Lewis D. and John Gilbert, Breswick & Company, and Randolph Phillips is that each are record or beneficial minority stockowners in Alleghany and Central, or both. Their representations with respect to the application of Alleghany to issue stock, Finance Docket No. 18866 will be considered separately in that proceeding. Primarily, their position is that under the act we are without power to consider Alleghany as a party applicant, because its acquisition of control of Central and its related carriers is unlawful for the reason that it was accomplished without our authorization under sections 5(2) and 5(4) of the act; that Alleghany does not in fact exercise control over Central's board of directors, even though the individuals had been nominated by Alleghany or its associates, and were elected by the stockholders after a prolonged proxy contest waged by Alleghany and the then management of Central; that Alleghany's status as a carrier subject to the act, authorized in Finance Docket No. 14692, June 5, 1945, expired automatically in January 1954, when it disposed of its last stock holdings and vestige of control of the Chesapeake & Ohio Railway Company, at which time Alleghany reverted to its original status of an investment company subject to the jurisdiction of the S. E. C.; and that Alleghany's desire to be subject to regulation by this Commission is solely a device to avoid regulation by the S. E. C. under the Investment Company Act. Alleghany's replies submit that the division correctly disposed of all the issues; that Alleghany's status as a carrier has remained unchanged since first decreed in 1945; and that the interveners' repeated petitions were filed in these proceedings merely to harass Alleghany in its operation of Central.

Central was formed in 1914 by the consolidation of 11 carrier companies. It is the parent company of the New York Central Railroad system, comprised of numerous carriers including several railroad systems and the railroads and properties controlled and operated by those companies under lease or otherwise. The present system was recognized by us as an integrated unit in *New York Central Unification*, 150 I. C. C. 278, decided January 14, 1929,

and upon the internal rearrangement of Central's corporate structure pursuant to our decision in Finance Docket No. 17700, *New York Central R. Co. Merger*, 282 I. C. C. 813 (not printed in full), decided June 18, 1952. As outlined in detail in the foregoing reports and in the record herein, the same executives serve Central and the subsidiary companies and the carriers of the system have interlocking directorates. When Alleghany, by stock ownership and by the favorable action of the stockholders acquired control of Central, all the properties within the carrier's orbit were under long established single operating control. The proposed merger of the Jeffersonville into the Big Four, both being units of the same carrier system, will simplify the internal corporate structure of Central. Alleghany states that from time to time other internal rearrangements will be initiated through mergers, consolidations, leases, and other acquisitions of property.

The consolidation and integration of separate railroad properties, most of them having originated as small or short lines, has been largely responsible for the development of the present great network of rail transportation in this country. It has enabled transportation service to respond to the expanding needs of commerce. Experiences in the early history of the country, dating back to Colonial times, indicated the absolute necessity of removing all unnecessary impediments to the movement of traffic, so that it could always be continuous from origin to destination. This has been a matter of concern to Congress and it has legislated on the subject many times. (See, for instance, Act of 1866, U. S. C. Sec. 84, and Sec. 7 of the Interstate Commerce Act.)

One of the outstanding characteristics of this process of consolidation and integration has been the formation of so-called family lines or systems of railroads—that is, separate railroad properties functioning as unified systems under common control and management.

To give Section 5 an interpretation which would require our approval each time stockholders decide to change directors of established system properties, or to elect new officers, and, consequently, to install new management

would have a tendency to set in motion within the organizations contending forces which might well impair or destroy the results of legitimate integration. Although Congress has subjected the merging of railroad properties in many respects to regulation in order to prevent abuses and to protect the public interest, we do not believe it intended for Section 5 to be construed in a way that might produce undesirable results. Our interpretation of this section is to the contrary.

Under the pertinent portions of section 5(2) of the act it is lawful, with our approval, for any carrier or two or more carriers jointly to acquire control of another carrier, or for a person which is not a carrier to acquire control of two or more carriers, or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier, through ownership of stock or otherwise. Whether Alleghany was a "carrier" or "a person which is not a carrier," and whether it had "control of one or more carriers", at the time of the filing of the application herein (September 20, 1954) are questions to be determined by us. In resolving these problems it is necessary to determine Alleghany's relationship with carriers of the Chesapeake system. The record shows that on or about January 19, 1954, Alleghany divested itself of its remaining stocks of the Chesapeake system, and no longer controlled or had the power to control any carrier subject to the act.

The contention that Alleghany does not control the individual directors on Central's board ignores the realities of the situation. Alleghany and its allied interests have succeeded in electing sufficient members of the board to permit them to organize and elect their own officers. Clearly the tenure in office of such directors as permitted this action depends upon their conformance to the views of the stockholders who elected them. In our opinion the power thus reposing in Alleghany constitutes control of Central.

The order of June 5, 1945 held that Alleghany should be considered as a carrier only for limited stated purposes. This holding in no way affects the determination of Alleghany's status under the provisions of paragraph (2) of

section 5, which would govern the determination of our jurisdiction over its acquisition of control of the Central. In view of the above stated divestiture by Alleghany of the stocks of carriers subject to the act, we conclude that at the time of its acquisition of control of the Central on May 26, 1954, it was in fact a "person not a carrier" as that phrase is used in section 5(2) of the act. As Central, at the time of such acquisition of control was recognized as a single established system, we conclude that the transaction was not within the scope of the above stated provisions of section 5(2) of the act and that our approval was not necessary.

The subsequent filing by Alleghany of its application in these proceedings for approval of a rearrangement of the corporate structure of Central and its subsidiaries was pursuant to and consistent with the decision of the United States Supreme Court in *United States* v. *Marshall Transport Co.*, 322 U. S. 31, which held that the controlling person was a necessary party in proceedings for approval of acquisition of the properties of a motor carrier subject to the act by a motor carrier controlled by a person not a carrier. The same was true with respect to the application of the New York Central for authority to acquire direct control, and by Alleghany to acquire indirect control of Boston and Albany Railroad Company, which application was granted by the division by report of March 22, 1955, in Finance Docket No. 18789.

Our jurisdiction under section 5(2) of the act over any rearrangement by Central of its ownership or control of its subsidiaries is well established. We do not deem it inconsistent with our lack of jurisdiction over acquisition of control over the established system, that Alleghany be considered a necessary party in proceedings for rearrangement of control. The first is a transaction in which it appears from the provisions of the act that no public interest is involved. But failure to recognize that the public interest requires our approval of changes in the relationship of the carriers constituting the system would ignore the clear intent of the act as interpreted by our own and by court decisions.

We conclude and find that we have jurisdiction to consider the application for approval of the merger of the Jeffersonville into the Big Four, modification of the lease by Central and the continued control of the Jeffersonville in modified form by Central and Alleghany. The details of the transaction and descriptions of the properties of the various companies were shown in the report of Division 4. We affirm the findings of Division 4 that these transactions and the continued control by Central and Alleghany are within the scope of section 5(2) of the act, as amended, that the terms and conditions are just and reasonable and that the transactions and continued control will be consistent with the public interest.

As appears from the foregoing discussion, Alleghany at the time it filed its application was in fact a person not a carrier which controlled an established system, and which was seeking authorization under section 5(2) for modified control of one of the system subsidiaries. Section 5(3) provides in part as follows: "Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2), to acquire control of any carrier or of two or more carriers, such person thereafter shall, to the extent provided by the Commission in such order, be considered as a carrier subject to such of the following provisions as are applicable to any carrier involved in such acquisition of control * * *". We believe it is clear that under these provisions we are required in connection with our approval of such an application to find that Alleghany is a carrier, and to determine the extent to which it should be subject to the provisions of the act specified in the quoted section, viz., section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive. It is our opinion that division 4 properly applied the quoted provisions of the act. We affirm that ruling.

An appropriate order will be entered.

Commissioner Cross concurs in the result.

Commissioner Elliott and Commissioner Hutchinson did not participate in the disposition of these proceedings.

Commissioner Freas was necessarily absent and did not participate in the disposition of the proceedings.

Document 10.

Second Status Order.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 24th day of May A. D. 1955.

FINANCE DOCKET No. 18656

LOUISVILLE & JEFFERSONVILLE BRIDGE AND RAILROAD COMPANY MERGER, ETC.

FINANCE DOCKET No. 14692

CHESAPEAKE & OHIO RAILWAY COMPANY PURCHASE, ETC.

It appearing, That the Commission, by division 4, by its report and order of March 2, 1955, in the above-entitled proceedings approved and authorized the merger of the properties of the Louisville & Jeffersonville Bridge and Railroad Company into the Cleveland, Cincinnati, Chicago & St. Louis Railway Company for ownership, management, and operation, and through that company, continued control of the said properties and franchises by The New York Central Railroad Company and the Alleghany Corporation, and the modification of a lease of January 2, 1930, between the Cleveland, Cincinnati, Chicago & St. Louis Railway Company and The New York Central Railroad Company respecting operation of the properties of the former; subjected the Alleghany Corporation to the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act; terminated the effective portions of the order of June 5, 1945, in Finance Docket No. 14692; and retained jurisdic-

tion to make such further order or orders as may be necessary or appropriate.

It further appearing, That on April 1, 1955, the United States Securities and Exchange Commission filed a petition for reconsideration and reversal of the division insofar as it holds the Alleghany Corporation to continue to be a carrier subject to provisions of the act under section 5(3); that on March 21, 1955, a joint petition for rehearing and reconsideration was filed by Lewis D. Gilbert and John Gilbert and Breswick & Company, against orders of division 4, dated February 9 and 15, and March 2, 1955, denying and dismissing previously filed petitions for leave to intervene in these proceedings; that on March 28, 1955, Randolph Phillips, *pro se,* filed a petition for leave to intervene and to join in the petition of the Gilberts; and that on April 11, 1955, a joint amended petition for leave to intervene and for reconsideration was filed by the Gilberts, Breswick & Company, and Phillips.

It further appearing, That the New York Central Railroad Company and the Alleghany Corporation filed replies to the petition of the Securities and Exchange Commission; and Alleghany Corporation filed replies to each petition filed by the Gilberts, Breswick & Company, and Phillips.

It is ordered, That the petition of the Securities and Exchange Commission to the extent it requests reconsideration be, and it is hereby, granted.

It is ordered, That said Lewis D. Gilbert, John Gilbert, Breswick & Co., and Randolph Phillips be, and they are hereby, permitted to intervene in the above-entitled proceedings and be treated as parties thereto as of the date hereof, and their petitions, so far as they request reconsideration be, and they are hereby granted, and their request for hearing be, and it is hereby, denied;

And it further appearing, Upon consideration of the record herein and the contentions set forth in said petitions and replies, that this Commission, on the date hereof, made

and filed a report on reconsideration containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof.

It is ordered, That the order dated March 2, 1955, described in the first paragraph hereof, be and it is hereby, affirmed;

And it is further ordered, That the jurisdiction of this Commission be, and it is hereby, retained for the purpose of making such further order or orders herein as hereafter may be necessary or appropriate.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

Document 11.

Report of the Commission.

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

FINANCE DOCKET NO. 18866

ALLEGHANY CORPORATION STOCK

Submitted April 14, 1955 *Decided May 26, 1955*

Authority granted to issue not exceeding (a) 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of applicant's cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) 14,768,352 shares of common stock, par value $1.00 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth herein. Condition prescribed, and the order made effective 10 days from its date.

BURTON K. WHEELER and EDWARD K. WHEELER for applicant.

GEORGE BRUSSEL, JR. and JOSEPH B. HYMAN for interveners in opposition to the application.

RANDOLPH PHILLIPS, *pro se*, intervener in opposition.

DIVISION 4, COMMISSIONERS JOHNSON, MITCHELL, AND TUGGLE

BY DIVISION 4:

The Alleghany Corporation, by an application filed February 18, 1955, applied for authority under section 20a of the Interstate Commerce Act to issue not exceeding 1,367,440 shares of 6-percent convertible preferred stock, hereinafter sometimes called 6-percent preferred stock, in connection with an exchange of such stock for shares of its cumulative 5½-percent preferred stock, series A, hereinafter sometimes called series A preferred stock, and to issue not exceeding 14,768,352 shares of its common stock, upon conversion of such 6-percent preferred stock. No representation respecting the application has been made by State authority. By order entered April 20, 1955, Breswick & Co., Lewis D. and John Gilbert, and Randolph Phillips, alleged stockholders of the applicant, were permitted to intervene in opposition to the application. These interveners requested that the application be assigned for hearing, but they described no evidence which they would produce if a hearing were assigned, and alleged no facts which would justify such assignment. In our opinion, no hearing is necessary to enable us to determine our decision upon the application.

The applicant was incorporated under the laws of the State of Maryland on January 26, 1929. It is authorized by its certificate of incorporation, as amended, among other things, to acquire by purchase, subscription, or otherwise, and to own, hold for investment, use, sell, assign, transfer, mortgage, pledge, exchange, or otherwise dispose of securities. Its holdings include the securities of certain railroad companies, including the New York Central Railroad Company.

By our order of March 2, 1955, in Finance Docket No. 18656 et al., *Louisville & Jeffersonville Bridge & R. Co. Merger*, 290 I. C. C. , we approved and authorized, among other things, subject to certain conditions, merger of the properties and franchises of the Louisville & Jeffersonville Bridge & Railroad Company into the Cleveland, Cincinnati, Chicago and St. Louis Railway Company for owner-

ship, management, and operation, and through the ownership of stock of the latter company, continuation of control of the properties and franchises of the former company by the New York Central Railroad Company and the Alleghany Corporation. The order further provided that unless and until otherwise ordered by this Commission, the Alleghany Corporation is to be considered as a common carrier subject to the provisions of section 20(1) to (10), inclusive, and section 20a(2) to (11), inclusive, of the Interstate Commerce Act, as amended, to the same extent that those provisions are applicable to the New York Central Railroad Company and its carrier subsidiaries and affiliates.

At a special meeting held on December 28, 1954, applicant's board of directors, hereinafter called the board, resolved that it was desirable that applicant's certificate of incorporation, hereinafter called the certificate, be amended to create 1,367,440 shares of a new class of stock to be known as 6-percent convertible preferred stock, par value $10 a share, convertible into shares of common stock, junior to the class of its $4 prior preferred convertible stock and senior to the existing class of preferred stock (of which the series A preferred stock is a series), and to its common stock, and to increase the authorized shares of common stock from 12,350,000 to 22,000,000 shares, so as to provide a sufficient number of shares into which such 6-percent preferred stock will be convertible. At a special meeting of applicant's stockholders held on February 8, 1955, as required by the certificate, the holders of two-thirds of the outstanding shares of $4 prior preferred convertible stock and of substantial majorities of the outstanding shares of series A preferred stock and common stock, voting as separate classes, approved the proposed amendments, and on that date appropriate articles of amendment of the certificate were filed with the State Tax Commission of the State of Maryland. The certificate, as so amended, provides for a total authorized capital stock of 24,895,807 shares, comprised of 28,367 shares of $4 prior preferred convertible stock, without par value, 1,367,440 shares of 6-percent preferred stock, par value $10 a share, 1,500,000 shares of

preferred stock, par value $100 a share, and 22,000,000 shares of common stock, par value $1 a share.

Pursuant to a resolution adopted by the executive committee of the board at a special meeting held on February 9, 1955, applicant proposes to issue, subject to receipt of our authorization not later than May 31, 1955, not exceeding 1,367,440 shares of the new 6-percent preferred stock in connection with an exchange of such stock for shares of its series A preferred stock, and not exceeding 14,768,352 shares of its common stock upon conversion of such 6-percent preferred stock, pursuant to an exchange offer dated February 10, 1955. Under such offer, the holders of applicant's outstanding series A preferred stock are given an opportunity to exchange their shares on the basis of 10 shares of 6-percent preferred stock for each share of series A preferred stock, subject to the approval of this Commission on or before May 31, 1955, and to the condition that 100,000 shares of series A preferred stock, or such lesser number as its board may deem sufficient to warrant consummation of the exchange offer, will be offered for exchange. The offer is open to all such holders until 3:30 p. m. eastern standard or daylight saving time, whichever is then in effect in the city of New York, on the closing date, which, under applicant's proposal, will be the fifth day (excluding Saturday, Sunday, and any legal holiday) after we have issued an order, substantially in the form requested, authorizing the proposed issue. Any holder of the series A preferred stock may accept the offer and deposit for exchange all or any number of full shares held by him. He may revoke his acceptance of the offer as a whole or in part and direct the return of the deposited stock, by written notice to the exchange agent, The Marine Midland Trust Company of New York, at any time prior to 3:30 p. m. on the closing date. As soon as practicable after that date, if the required number of shares of series A preferred have been accepted by the exchange agent for exchange, the applicant will issue and deliver the required number of shares of 6-percent preferred stock in temporary form in accordance with the instructions set forth in the

letter of transmittal accompanying the certificates surrendered. The applicant has reserved the right to extend the exchange offer for an additional period or periods. However, regardless of such possible extension or extensions, the conversion rights of the 6-percent preferred stock will be fixed as of the closing date and all shares tendered for exchange on or before 3:30 p. m. on that date will be exchanged as of such date. If the applicant determines not to consummate the exchange offer because less than 100,000 shares of series A preferred stock have been duly submitted for exchange or the requisite authority has not been granted by us on or before May 31, 1955, or if our order denies any material portion of the application or imposes terms or conditions which are not acceptable to it, the exchange offer will be void and the surrendered stock certificates will be returned to their respective owners. All exchanged shares of series A preferred stock will be retired. All costs and expenses of the exchange will be borne by the applicant except the expense incurred by the stockholders in delivering their stock to the exchange agent.

Of the series A preferred stock outstanding as of January 31, 1955, the chairman of applicant's board and his wife were the beneficial owners of 11,087 and 3,738 shares, respectively, and two other members of the board were beneficial owners of 12,959 and 500 shares, respectively. These holdings, aggregating 28,284 shares, represent approximately 20.7 percent of the 136,744 shares outstanding in the hands of the public. The application represents that these stockholders each has the present intention of tendering approximately the same proportion of their holdings of such stock, as compared with the total number of shares thereof then outstanding, as are tendered by other persons. However, none of them has entered into any agreement with applicant, or is under any obligation to do so, each of them reserving the right to take whatever action may at the time be deemed desirable in his own interest under the circumstances existing at the time such stockholder makes his final decision. The three members of the board hereinbefore mentioned, as of January 31, 1955, were

beneficial owners of 547,500 shares, or approximately 11.8 percent, of the 4,637,797 shares of applicant's common stock outstanding. Also, on that date, two of these directors and the wife of the chairman were beneficial owners of subscription warrants entitling them to purchase, in the aggregate, 241,940 shares of applicant's common stock at a price of $3.75 a share; and the chairman was the beneficial owner of options to purchase 100,000 shares of such stock at a price of $3.0625 a share.

If the exchange offer is consummated, the board intends following the issuance of the 6-percent preferred stock thereafter to commence the payment of dividends, if earned, with respect to all then outstanding shares of series A preferred stock at the annual rate of $5.50 a share. It should be noted, however, that neither the dividend requirements of the series A preferred stock nor of the 6-percent preferred stock were earned from portfolio income in either 1953 or 1954. Because of the uncertainty as to the number of shares of series A preferred stock which may be surrendered, the board is not prepared presently to decide whether it will call for redemption the unexchanged shares or to what extent, except as hereinbefore stated, it will pay dividends on account of arrearages thereon.

The applicant has certain bank loans, two of which are evidenced by promissory notes, one to the Chase National Bank of the City of New York, authorized by our order of August 6, 1951, in Finance Docket No. 17423, *Alleghany Corporation Note,* 282 I. C. C. 807, and the other to The First National Bank of Boston, authorized by our order of September 3, 1952, in Finance Docket No. 17871, *Alleghany Corporation Notes,* 282 I. C. C. 817. The applicant has agreed, in connection with these two loans, as well as in the indenture pursuant to which its 5-percent sinking-fund debentures, due November 1, 1962, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Alleghany Corporation Securities,* 282 I. C. C. 818, were issued, among other things, not to pay, without the consent of such banks and holders of two-thirds of the aggregate principal amount of outstanding debentures, any cash dividends

or other distribution on, or to purchase, redeem, or otherwise retire, any shares of its capital stock, except in exchange for other shares of its capital stock, if the aggregate amount expended therefor would exceed a particular sum as computed under prescribed formulas. Accordingly, should applicant decide to redeem unexchanged shares of series A preferred stock, such redemption might conceivably require the consent of such banks and debenture holders.

A description of each class of applicant's stock, with preferences, conversion and other rights of each class of the authorized stock, is set forth in the certificate.

The rights of holders of the 6-percent preferred stock and the series A preferred stock will be similar in many respects but there will be substantial differences as mentioned hereinafter. The 6-percent preferred stock is senior to the series A preferred stock and to the authorized but unissued preferred stock of which class the series A preferred stock is a series. The 6-percent preferred stock has a par value of $10 a share, whereas the series A preferred stock has a par value of $100 a share. When, and as declared by the board, the latter stock is entitled to cumulative dividends at the rate of 5½ per cent per annum in preference to the common stock, whereas the 6-percent preferred stock is entitled to cumulative dividends at the rate of 6-percent per annum in preference to both the series A preferred and common stock. Dividends on the 6-percent preferred stock will be payable semiannually on April 1 and October 1, will be cumulative from May 1, 1955, and will begin October 1, 1955. The redemption value used in the conversion formula set forth below takes into account the fact that dividends on the 6-percent preferred stock do not commence to accrue until a date which may be subsequent to issuance and is designed to compensate therefor. Regarding 10 shares of the 6-percent preferred stock as the equivalent of 1 share of the series A preferred stock for the purposes of liquidation, dissolution and/or redemption, there is no distinction in the amount payable (exclusive of dividend arrearages) to the holders of each class upon the happening of any of

the aforesaid contingencies, except that payment will be made to the holders of the 6-percent preferred stock before any payment is made to the holders of the series A preferred stock. However, because the dividend arrearages on the series A preferred stock are substantial, the relative redemption values of each class are substantially different. The cash redemption value of 1 share of series A preferred stock on May 1, 1955; will be $237, whereas that of 10 shares of 6-percent preferred stock would aggregate $105, the difference of $132 representing accumulated and unpaid dividends. In the event of voluntary liquidation or dissolution of the applicant, or upon redemption, the holders of 6-percent preferred stock will be entitled to receive, before any payment is made to the preferred or common stockholders, $10.50 a share, and in case of involuntary liquidation or dissolution $10 a share, plus, in each instance, all dividends accumulated and unpaid thereon, whether or not earned or declared. Each share of series A preferred stock is in each such instance entitled to an amount (exclusive of dividend arrearages) equal to 10 times the equivalent amount set forth with respect to each share of 6-percent preferred stock. There is no restriction with respect to the repurchase or redemption of shares of either class of stock while there is any arrearage in the payment of dividends thereon, but the applicant, by the express terms of its certificate, is precluded from redeeming any shares of 6-percent preferred stock prior to May 1, 1970. There is no such time limitation with respect to the redemption of series A preferred stock. Neither class of stock is entitled to preemptive rights. The series A preferred stock is entitled to the benefits of a sinking fund, the provisions of which are not operative at the present time because of accumulated dividends in arrears. In case of default in the payment of four quarterly installments of dividends on such stock, or the elapsing of 24 consecutive months during which applicant shall at no time have fully paid up all dividends thereon, such stock is entitled to elect two directors. Because of the default in the payment of dividends thereon, such stock is now entitled to elect two directors.

There is no provision for a sinking fund for the 6-percent preferred stock. The holders thereof, voting as a class, have a right to elect two directors regardless of whether or not dividends are currently paid. The series A preferred stock is not convertible. The holder of each share of 6-percent preferred stock, at any time prior to 5 days before its redemption, will, upon payment to applicant of $3.75 per share of common stock into which such share is convertible, be entitled to convert such share into such number of fully paid and nonassessable shares of common stock, without adjustment or dividends in respect of either such share or the shares of the common stock into which it is converted, as shall be arrived at by dividing 23.7 (being 1/10 of the May 1, 1955 redemption price per share of series A preferred stock) by the difference between $3.75 and an amount equal to the closing price of the common stock on the New York Stock Exchange on the closing date of the exchange offer (or if no sale takes place on such date then an amount equal to the closing price on the last preceding day on which a sale is made). The result of such computation shall be computed to the nearest 1/10 of a share, provided, however, that in no event, regardless of the arithmetical result of such computation, shall any share of 6-percent preferred stock be convertible into more than 10.8 shares of common stock. At the time of the original issuance of the 6-percent preferred stock, the holders thereof will be advised by letter and by printed endorsement on the certificates representing such stock of the number of shares of common stock into which each share of 6-percent preferred stock is convertible upon payment of $3.75 per share of common stock. No fractional shares or scrip representing fractional shares will be issued upon such conversion. If the aggregate number of shares of 6-percent preferred stock surrendered for conversion at any one time by any one holder are convertible into a whole number and a fraction of shares of common stock, the number of shares of common stock issuable upon such conversion shall equal such whole number, and an amount equal to such fraction multiplied by the excess

of the closing price on the New York Stock Exchange of the common stock on the effective date of such conversion (or if no sale took place on such date then the excess of the closing price on the last preceding day on which a sale was made) over $3.75 will be paid in cash by the applicant to such holder. In the event of any reclassification, exchange or other change of the common stock, or the declaration of or payment of any dividend in shares of stock of any class, the number of shares of common stock (and in the case of the declaration or payment of any dividend in shares of stock of any other class, the number of shares of stock of such other class) issuable on conversion of the 6-percent preferred stock will be adjusted accordingly.

The affirmative approval of the holders of a majority of the outstanding shares of series A preferred stock is required before applicant may issue any additional shares of such stock or of any other class of stock on a parity with or having priority thereover. The issuance of any shares of stock on a parity with or having priority over the 6-percent preferred stock, or the making of any material change in applicant's certificate or bylaws, with respect to the latter stock, requires the affirmative approval of the holders of two-thirds of the outstanding shares thereof. As of February 16, 1955, 144,544 shares of series A preferred stock, out of an authorized 1,195,000 shares, were issued, of which 7,800 were held in applicant's treasury and 136,744 shares were outstanding in the hands of the public, held by approximately 1,186 stockholders. None of the 6-percent preferred stock has been issued.

The series A preferred stock and the common stock are listed on the New York Stock Exchange and applicant intends to make application to list on such Exchange the 6-percent preferred stock and the common stock into which such stock may be converted.

J. P. Morgan & Co. Incorporated, and Colonial Trust Company, both of New York City, have been named as transfer agent and registrar, respectively, of the 6-percent preferred stock.

Of the authorized common stock, 4,641,585 shares were issued and outstanding in the hands of the public as of January 31, 1955, held by approximately 15,120 stockholders, including 8 directors of applicant who were the beneficial owners of 578,846 shares; 410,032 shares were reserved for issue upon conversion of the presently outstanding $4 prior preferred stock, 1,999,700 shares were reserved for issue upon exercise of the presently outstanding common stock subscription warrants of the applicant, and 100,000 shares were reserved for issue upon exercise of previously granted options. Common stockholders have waived their preemptive rights as to the 100,000 shares reserved in connection with previously granted options, as well as to an additional 55,000 shares of common stock, to be sold to directors, officers and employees of the applicant, upon exercise of options or otherwise, but such shares have not yet been sold, options covering them have not yet been granted, and such shares have not been reserved. Each holder of common stock is entitled to one vote for each share on matters on which such stock is entitled to vote, including the election of directors. There is no provision for cumulative voting of common stock. Upon liquidation or dissolution of the applicant, the holders of such stock will be entitled to share ratably in the assets remaining after payment of all amounts payable to the holders of the preference stocks. The holders of common stock are entitled to purchase ratably, according to their respective holdings, any shares of common stock issued or sold for cash, and any stock purchase warrants or other option rights which may be issued giving the right to purchase shares of such stock for cash, in either case upon appropriate terms, but with certain designated exceptions, one of which includes any shares of common stock issued upon conversion of preferred stock convertible into common stock. Consequently, the shares of common stock proposed to be issued and sold upon conversion of the 6-percent preferred stock would not be subject to preemptive rights. The $3.75 which applicant will receive for each share of

common stock issued upon conversion will be used for its general corporate purposes.

During January 1955, the high and low sales prices per share on the New York Stock Exchange of the series A preferred stock were $228 and $209.50, respectively, and of the common stock were $9.50 and $7.25, respectively.

As of January 31, 1955, there were issued and outstanding common stock subscription warrants of the applicant in bearer form, authorized by our order of November 20, 1952, in Finance Docket No. 17937, *Alleghany Corporation Securities, supra* entitling the owners thereof from time to time, without limitation as to time, to subscribe for and purchase 1,999,700 shares of the authorized but unissued common stock at a price of $3.75 a share, which shares have been reserved for such purpose. Such warrants do not entitle the owners thereof to any voting rights or other rights as stockholders of the applicant, and no dividend or interest is payable or accrues with respect thereto or to the shares of common stock which may be subscribed for and purchased thereunder until and unless, and except to the extent that, such warrants are exercised. These warrants are listed on the American Stock Exchange.

In September 1946, the applicant inaugurated a program of purchasing in the open market its own prior preferred convertible stock and series A preferred stock, and of presenting to the holders of those stocks a series of exchange offers and invitations for tenders with the object of benefiting the remaining holders of such preference stocks, and eventually restoring an asset equity for the common stock. As a result of this program, the applicant has eliminated the prior preferred convertible stock from its capital structure and drastically reduced the amount of its series A preferred stock outstanding, has eliminated substantial amounts of dividend arrearages, and the capital deficit has been wiped out.

The proposed issue of 6-percent preferred stock would result in a further substantial reduction in the dividend arrearage on the series A preferred stock, and a subsequent redemption of the unexchanged shares of the latter stock

would complete the elimination of such arrearage and place applicant's capital structure on a current basis for the first time in over 20 years. Applicant's management is of the opinion that the proposed exchange offer is in the best interests of applicant and the holders of all three outstanding classes of its stock. No dividends were paid on any class of its stock from May 1, 1931, through the year 1949, nor in 1953. Dividends of $2.50, $5 and $10 a share were paid on its prior preferred convertible stock in 1950, 1951, and 1952, respectively. A dividend of $4 a share was paid on its $4 prior preferred stock in 1954. The aggregate cash dividends paid in 1950, 1951, 1952 and 1954 were $89,567.50, $163,135, $303,470, and $103.380, respectively. Assuming a 100-percent exchange of series A preferred stock and that during the entire year 1956 there are issued and outstanding 25,845 shares of $4 prior preferred stock and 1,367,440 shares of 6-percent preferred stock, the aggregate dividend requirements for each class of such stock would be $103,380 and $820,464, respectively. Applicant expects its portfolio income during 1955 to be sufficient to meet the dividend requirements on all classes of its preferred stock. In addition, it expects to realize substantial income from the sale of securities, which income is also available for the payment of dividends.

The dividend accumulations on the series A preferred stock must be paid before dividends may be paid on the common stock. To the extent that the series A preferred stock is redeemed instead of exchanged, or dividend arrearages thereon are paid in cash, applicant's assets will be reduced by the aggregate redemption price of the stock redeemed, and its income, derived from investments, may be reasonably expected to be reduced accordingly.

The conversion rights of the 6-percent preferred stock will afford the holders thereof an opportunity to participate in the progress of applicant, as reflected in the market value of its common stock. Although their existence will not have any immediate effect on the common stock, the exercise thereof will at that time have the effect of diluting the rights of the common stockholders, as such rights then

exist. Assuming that the 136,744 presently outstanding shares of series A preferred stock are exchanged and the shares of 6-percent preferred stock are ultimately converted into common stock, and assuming closing prices of such common stock of $6 and $8.375 a share, there would be required to be issued 14,358,120 and 6,973,944 shares of common stock or about 75.6 and 60.1 percent, respectively, of all shares thereof outstanding upon giving effect to such conversion, for which applicant would receive an aggregate of $53,842,950 and $26,152,290, respectively, in payment for such shares (less such nominal sums as may be paid for fractional shares on conversion) which cash will be available for working capital and investment.

The short term effect of the exchange of series A preferred stock for a 6-percent preferred stock will result in a substantial increase in the net asset value per share of applicant's common stock by reason of the elimination of arrearages on the series A preferred stock. The 6-percent preferred stock is not redeemable by the applicant until May 1, 1970, thereby precluding forced conversion for the period. Consequently, it is expected that at least until dividends are paid on the common stock, a substantial part of the 6-percent preferred stock will remain unconverted and outstanding. However, to the extent that the 6-percent preferred stock is converted into common stock, such conversions will tend to reduce the net asset value of the common stock if such value at such time exceeds approximately $4.50 a share.

The applicant's general balance sheet as of November 30, 1954, in which investments are shown at cost, less an adjustment reserve, shows the following items, among others:

ASSETS

Total investments	$43,264,637
Current assets	8,256,621
Deferred assets	7,075
Unadjusted debits	1,362,699
Total assets	$52,891,032

LIABILITIES

Capital stock:		
$4 prior preferred convertible	$ 2,067,600	
Preferred	13,674,400	
Common	4,637,797	
Premiums on common stock	142,297	
Total stock		$20,522,094
Long-term funded debt unmatured:		
Book liability	21,200,000	
Reacquired and held in treasury	504,000	
Total long-term debt		20,696,000
Current liabilities		2,427,928
Deferred liabilities		2,050
Surplus—unearned	106,976,335	
earned—appropriated	718	
earned—unappropriated (deficit)	97,734,093	
Total surplus		9,242,960
Total liabilities		$52,891,032

Another balance sheet statement of applicant as of the same date, but reflecting certain investments in securities at values based on market quotations on that date, shows total assets of $82,069,676 and total surplus $38,645,208. Its income statements for 1951, 1952, 1953, and the first 11 months of 1954 show net income, exclusive of profit and loss on security transactions, of $920,378, $861,652, $244,222, and $161,593, respectively. These statements also show that from the sale of securities applicant sustained a net loss of $605,037 in 1951, and gains of $50,806, $6,452,830, and $1,357,640 in 1952, 1953, and the 11-month period in 1954, respectively.

It is pointed out by applicant that on the basis of an exchange of 100,000 shares of series A preferred stock and redemption of the remaining 36,744 shares, the arrears of

dividends thereon would be eliminated at a cost of about one-fourth the amount of cash that would be required to redeem all such stock, and if all the stock should be exchanged, the accumulated dividends would be eliminated entirely without the expenditure of any cash. The aggregate accrued dividends on such stock as of January 31, 1955, were $17,862,185 or $130.625 a share. Inasmuch as there is no dividend arrearage on the $4 prior preferred stock and dividends are currently being paid thereon, the 6-percent preferred stock would be entitled to receive dividends on a current basis.

Applicant has entered into an agreement, dated February 8, 1955, with Kidder, Peabody & Co., as dealer manager, whereby the latter agrees to use its best efforts to form and manage a group of securities dealers, including itself, to solicit acceptances of the exchange offer by holders of series A preferred stock. The soliciting dealers, including the dealer manager, will receive a commission of $1 for each share of series A preferred stock submitted through them to the exchange agent and exchanged in accordance with the exchange offer; provided, however, that the maximum aggregate commissions payable with respect to any single holder of record will be $300, except in certain cases in which the stock is beneficially owned by others. The payment of such soliciting dealers' commissions is subject to the exchange offer being consummated. The dealer manager will be reimbursed for its out-of-pocket expenses up to $2,000, and if the exchange offer is consummated, it will receive the additional sum of $10,000, as a flat fee for its services and an amount equal to the aggregate commissions payable by it as dealer manager to the soliciting dealers, including itself, as provided in the agreement. The applicant will not solicit such exchanges. The dealer manager is not authorized to act as agent of the applicant and the soliciting dealers are not authorized to act as agents of the applicant or of the dealer manager.

The expenses to be incurred in connection with the proposed issue of 6-percent preferred stock, and common stock upon conversion thereof, cannot be estimated accu-

rately at the present time because of the uncertainty of certain features of the transactions, including the number of certificates that will have to be handled. Certain other expenses, such as counsel fees, printing, and other items shown in the application are estimated at $70,580.

The proposed issue comes within exceptions (1) and (2) set forth in the Commission's report of May 8, 1944, in Ex Parte 158, *In Re Competitive Bidding in Sale of Securities,* 257 I. C. C. 129 (164), and competitive bidding is, therefore, not required in connection therewith.

Intervenors allege that the exchange offer and the proposed issuance of securities are not for lawful objects within the corporate purposes of the applicant, are not compatible with the public interest, are unfair and inequitable to the holders of its common stock, and will result in unjust enrichment of the holders of the series A preferred stock; but, except to the limited extent mentioned below, their charges are lacking in particularity and are not supported by factual statements showing wherein the proposal is unlawful or unfair.

Intervenors state that issue of stock as proposed will dilute the equity of the common stock and, as a result thereof, holders of such stock will not receive a fair and just return on the present value of their investments. We have already pointed out that conversion of the 6-percent preferred stock will result in diluting the rights of the common stock. However, such fact does not make the proposal unfair, as compensating advantages, which have been described, will accrue to the common stockholders. The ultimate worth of the conversion rights, which holders of the series A preferred stock who accept the exchange offer will receive in partial satisfaction for the surrender of their rights to accrued and unpaid dividends, will be, of course, contingent upon the future value of the common stock. The immediate effect of the exchange of series A preferred stock for the 6-percent preferred stock will be to increase the net asset value of the common stock.

Intervenors state that the common stockholders have not been protected by "arms-length bargaining" between

persons owning or representing only common stock and owners or representatives of the other classes of securities affected by the transactions, and that the terms of the transactions have been imposed solely by management interests under the domination and control of the chairman of applicant's board of directors, whose total investment in series A preferred stock, with that of his wife, exceeds that in the common stock. A sufficient answer to this contention appears to be furnished by the fact that the charter amendment authorizing the issue and exchange of the 6-percent preferred stock was approved by the votes of holders of 3,269,217 shares of applicant's common stock, which constituted 70 percent of the total outstanding common stock and more than 97 percent of the common stock voted on such proposal. As of January 31, 1955, the directors of applicant owned 578,846 shares of common stock and the bulk of this (516,500) shares was beneficially owned by its president, who owned only 12,959 shares of series A preferred stock. Based on high sales prices of these stocks in January, recited above, this person's investment in common stock was approximately 69 percent greater than his investment in preferred stock. In addition, he beneficially owned warrants entitling him to purchase 226,340 shares of common stock.

Other allegations of interveners raise questions as to the necessity of the proposed exchange, and they suggest that applicant should devote its available resources to the redemption and retirement of the series A preferred stock instead of making new investments and extending the risk of the common stock's equity. It is not our function to substitute our judgment for that of management, where the latter has exercised sound discretion and where as here the findings required by the statute as a condition to approval of the issue of securities properly may be made.

It does not appear that the proposed issue will adversely affect any carrier under the control of the applicant, or impair such carriers' ability to serve the public. Nor, with the modification hereinafter stated, does it appear that the proposal will be unfair or inequitable to any class of the applicant's stockholders.

In order to eliminate the possibility of manipulation of the common stock prices, with the object of influencing the conversion rights of the 6-percent preferred stock, and to make it possible for holders of the series A preferred stock to determine prior to the closing date of the exchange offer what the conversion ratio will be, our approval of the proposed issue of stock will be conditioned upon modification of the exchange offer so that, in lieu of the provision under which the conversion rights would be dependent upon the price of the common stock on a date subsequent to our order, the conversion ratio will be dependent upon the closing price of applicant's common stock on the New York Stock Exchange on the last day preceding the date of our order, or if no sale takes place on that day, on the closing price on the last preceding day on which a sale is made.

Subject to the foregoing condition, we find that the proposed issue by the Alleghany Corporation of not exceeding 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, and not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of the 6-percent convertible preferred stock, as aforesaid is consistent with the proper performance of its service to the public by each carrier which is under the control of such corporation, that it will not impair the ability of any such carrier to perform such service, that it is otherwise consistent with the public interest, and that it (a) is for lawful objects within its corporate purposes and compatible with the public interest, which are necessary and appropriate for and consistent with the proper performance by such carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purposes.

An appropriate order will be entered, in which suitable provision will be made for submission of journal entries to record the transaction.

Document 12.

First Preferred Stock Order.

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 26th day of May, A. D. 1955.

FINANCE DOCKET No. 18866

ALLEGHANY CORPORATION STOCK

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, subject to the condition stated in the aforesaid report, the Alleghany Corporation be, and it is hereby, authorized to issue (a) not exceeding 1,367,440 shares of 6-percent convertible preferred stock, par value $10 a share, to be offered to the holders of its cumulative 5½-percent preferred stock, series A, par value $100 a share, in exchange, on the basis of 10 shares of 6-percent convertible preferred stock for each share of cumulative 5½-percent preferred stock, series A, and (b) not exceeding 14,768,352 shares of common stock, par value $1 a share, upon conversion of such 6-percent convertible preferred stock, on the basis set forth in the application and aforesaid report, the proceeds from the issue of such common stock to be used for general corporate purposes;

It is further ordered, That, except as herein authorized, said stock shall not be sold, pledged, repledged, or otherwise disposed of by the applicant, unless or until so ordered or approved by this Commission;

It is further ordered, That the applicant shall report concerning the matters herein involved in conformity with the order of the Commission, by division 4, dated August 9, 1946, as amended, respecting applications filed under section 20a of the Interstate Commerce Act (49 C. F. R. 56);

It is further ordered, That the applicant shall submit for the consideration and approval of this Commission three copies of the journal entries required to record the transaction;

It is further ordered, That nothing herein shall be construed to imply any guaranty or obligation as to said stock, or dividends thereon, on the part of the United States; and

It is further ordered, That this order shall be effective 10 days from and after its date.

By the Commission, division 4.

HAROLD D. McCOY,
Secretary.

(SEAL)

Document 13.

Second Preferred Stock Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 22nd day of June, A. D. 1955.

FINANCE DOCKET NO. 18866

ALLEGHANY CORPORATION STOCK

Upon consideration of the record in the above-entitled proceeding, the petition filed June 2, 1955, by Breswick & Co., et al., requesting reconsideration of the report and order by division 4, filed and entered herein May 26, 1955, and applicant's reply to the petition; and

It appearing, That the alleged "Protective Committee for Common Stockholders of the Alleghany Corporation", which joined in the said petition and prayed for leave to intervene herein, is not a party of record and is not entitled to file a petition for reconsideration, and has not complied with the Commission's General Rules of Practice and the provisions of its order, by division 4, of August 9, 1946 (49 C. F. R. 56.3 (d)), relating to petitions for leave to intervene; and

It further appearing, That the material matters set forth in the petition were considered by division 4 and discussed in its report, and that the petition presents no facts or arguments which warrant reconsideration:

It is ordered, That all references to the said alleged protective committee contained in the petition be, and they are hereby, stricken therefrom; and

It is further ordered, That the said petition be, and it is hereby, denied, and that the said order of May 26, 1955, by division 4, shall be effective as of the date hereof.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)

Document 14.

1945 SEC Order.

UNITED STATES OF AMERICA

BEFORE THE

SECURITIES AND EXCHANGE COMMISSION

At a regular session of the Securities and Exchange Commission, held at its office in the City of Philadelphia, Pa., on the 4th day of October, A. D., 1945.

IN THE MATTER

of

ALLEGHANY CORPORATION.

File No. 811-338

Investment Company Act of 1940—
Sections 3 (c) (9) and (8) (f)

Alleghany Corporation, a registered investment company, having filed an application pursuant to Section 8 (f) of the Investment Company Act of 1940 for an order declaring that it has ceased to be an investment company within the meaning of said Act;

A public hearing having been duly held, after appropriate notice, and the Commission having this day issued its Findings and Opinion in the matter;

IT IS HEREBY DECLARED that Alleghany Corporation has ceased to be and is not now an investment company within the meaning of the Investment Company Act of 1940; and

IT IS ORDERED that the registration of Alleghany Corporation under the Investment Company Act of 1940 shall

forthwith cease to be in effect, *provided, however*, that if in the future Alleghany Corporation ceases to be subject to regulation under the Interstate Commerce Act as set forth in such Findings and Opinion, this order may be revoked, suspended or modified after appropriate notice and opportunity for hearing.

By the Commission.

ORVAL L. DUBOIS,
Secretary.

(SEAL)

Office - Supreme Court, U. S.
FILED
FEB 15 1956
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. [redacted] 36

ALLEGHANY CORPORATION,

Appellant,

vs.

BRESWICK & CO., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE CASE AND FOR FURTHER RELIEF IN CONNECTION THEREWITH.

DAVID HARTFIELD, JR.,
EDWARD K. WHEELER,
Counsel for Petitioner,
14 Wall Street,
New York 5, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No.

ALLEGHANY CORPORATION,

Appellant,

vs.

BRESWICK & Co., RANDOLPH PHILLIPS and MYRON NEISLOSS, as common stockholders of Alleghany Corporation, individually and in behalf of all other common stockholders of Alleghany Corporation similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO ADVANCE CASE AND FOR FURTHER RELIEF IN CONNECTION THEREWITH.

Now comes petitioner, Alleghany Corporation, (hereinafter "Alleghany") by its attorneys, David Hartfield, Jr. and Edward K. Wheeler, and moves this Honorable Court for an order pursuant to Rule 43(4) of the Revised Rules of the Supreme Court of the United States to advance the argument of the above entitled cause so that it shall be heard with special expedition, and for an order, in part pursuant to Rule 41(4), as more fully set forth hereinafter, varying the normal time intervals and procedures to bring on a case for hearing.

As grounds for this motion it is shown that:

A. The Injunction.

On June 23, 1955, at 12 o'clock noon, the Interstate Commerce Commission made public the second and last of its two orders approving a voluntary exchange of Alleghany's Series A, 5½% preferred stock (hereinafter "5½% stock") for new 6% cumulative preferred stock (hereinafter "6% stock"). This exchange offer had been approved four months earlier at a February 8, 1955 stockholders meeting by all classes of Alleghany's stockholders, including 97½% of the common stockholders voting, representing over 70% of that class. Thousands of preferred stockholders had voluntarily tendered their 5½% stock to The Marine Midland Bank (hereinafter "exchange agent") awaiting the order of I. C. C. which would permit the exchange to be consummated. The market value of the 6% stock was upwards of $40,000,000.

By the close of business on June 23, 1955, the exchange agent had delivered to brokers and individuals some 900,000 shares of the new issue of approximately 1,300,000 shares. Some 400,000 shares remained for delivery, when a single judge, *ex parte*, at 5:55 P. M. of June 23, 1955,* at the behest of appellees whose total investment in Alleghany was worth about $6,300 and who owned only 700 shares of common stock (.002% of this class), enjoined the exchange agent from delivering this balance of 400,000 shares; enjoined J. P. Morgan & Co. Incorporated (hereinafter "transfer agent") from transferring the 6% stock; and enjoined Alleghany from taking any action in regard thereto. Except as modified by Mr. Justice Harlan in

* At a time when Alleghany was not yet a party and when plaintiffs' complaint did not put the exchange offer or the I. C. C. orders with respect thereto into issue.

August of 1955, as said modification has been incorporated in the District Court's final decree, the injunction still continues in all its important and damaging aspects.

Alleghany has taken every possible step as speedily as possible in an effort to bring relief to its stockholders by the promptest prosecution of all phases of this case, including the taking of an appeal on the morning of the second business day after its application for reargument was denied. It has docketed the case in this Court in the shortest possible time.

B. The Multiplying Damage to Stockholders Resulting from the Injunction.

The plight of 6% stockholders who did not obtain their 6% stock before the *ex parte* injunction is slightly different than the plight of those who did obtain their 6% stock, though indeed the plight of both groups of stockholders is serious. Those who did not get their 6% stock (the 400,000 shares) have nothing but a "window ticket" issued by the exchange agent. They may not borrow on their "window tickets"; they may not utilize the money invested and frozen in the 6% stock; they cannot use their money to meet their obligations or pay their taxes; they are denied, because of the chaos created in Alleghany's corporate affairs by this injunction, the receipt of dividends to which they would be entitled were it not for the injunction. With the passage of every day they are further denied their rights to the use of their property. If there should be a reversal in this Court of the District Court's decree, it may in many instances come too late to prevent financial ruin to those in present need of a liquid asset. We can conceive of no situation where the maxim that "justice delayed is justice denied" has greater force.

The plight of those who own the roughly 900,000 shares delivered before the issuance of the injunction is equally serious, though of a slightly different nature. Mr. Justice Harlan in August of 1955 granted *supersedeas* and a stay pending appeal from interlocutory injunction* to the extent of permitting the transfer agent to transfer the 900,000 shares, saying, *inter alia*:

> "But for the fact that staying the injunction to the full extent that it affects the preferred stock issue might render moot the whole appeal from that part of the injunction, I would be disposed to grant that relief. * * * Under the circumstances, I think the fair thing to do is to stay the injunction insofar as it relates to the 900,000 shares of new preferred stock which already have been issued, and let the injunction stand as regards the 400,000 unissued shares."

We think it is fair to conclude that Mr. Justice Harlan did not expect that the relief he granted would be a futile act, but that it would enable the 900,000 shares of delivered 6% stock to be traded on the New York Stock Exchange and by over-the-counter dealers. Instead, trading in these shares which had been suspended both by the New York Stock Exchange and the National Association of Securities Dealers (hereinafter "N.A.S.D.") prior to his order, continues suspended, neither body being satisfied that no cloud remains over this stock issue. Thus, the relief granted by Mr. Justice Harlan, through no fault of his, has been practically valueless to Alleghany's investors. The only

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* That appeal taken in August 1955 was not prosecuted, as final hearing came on to be heard in the District Court in September of 1955 before this Court resumed its session. The District Court did not enter its final decree until December 23, 1955, and did not decide applications for rehearing until Friday night, January 27, 1956. Notice of appeal was filed Tuesday morning, January 31, 1956.

way a holder of 6% stock may transfer his stock is from hand-to-hand, and this only if he was fortunate enough to have had his shares delivered to him before the issuance of the restraining order. This makes the security for all practical purposes non-negotiable. Even with the ephemeral possibility of hand-to-hand negotiation, the stock is non-pledgeable. As each day passes the stockholders' situation becomes more dire. Each day that passes they continue to be deprived of uses of their property, many of which uses evaporate as the freeze continues. The security is not even available for margin purposes and brokerage houses have "called" margin loans, just as banks have "called" collateral loans, in respect to loans made by the holders of the 6% stock and secured by such stock. Only wealthy stockholders who are fortunate enough to have other capital can use this other capital as collateral for the "called" loans, while poor stockholders face ever increasing pressure, perhaps even bankruptcy, because of inability to meet obligations which they could meet were it not for the monkey wrench of injunction which has wrecked the market in this stock. If space permitted, a myriad of specific illustrations of this harm to unfortunate investors, running the gamut from a postponed marriage to a ruined business, could be supplied.

C. The Damage to Alleghany.

While in a large sense damage to Alleghany's stockholders is damage to Alleghany, Alleghany's corporate entity itself has suffered and continues to suffer damage. As a large publicly held corporation it should hold its annual meeting. It cannot hold its annual meeting because it cannot determine who holds what classes of stock and who, consequently, is entitled to vote for what directors. Alle-

ghany's charter now provides that the 6% stockholders are entitled to elect two directors. As things now stand, the 5½% stockholders are also entitled to elect two directors. There are only some 4,000 shares of the 5½% stock outstanding, since the holders of approximately 132,000 of the previously outstanding 136,000 shares of the 5½% stock are, or may now be, 6% stockholders. Thus 4,000 shares of 5½% stock, under one interpretation of the opinion below, would elect one-fourth of the Board of Directors of Alleghany, providing Alleghany knew who were 5½% stockholders and who were 6% stockholders. It does not, however, know for a certainty who is a 6% holder and who is a 5½% holder, since one inference from the opinion and injunction below is that the 6% stock may be invalid. If Alleghany knew where it stood and the cloud were removed from the 6% stock issue, it would redeem the 4,000 shares of 5½% stock outstanding and eliminate this problem.

Alleghany and its stockholders had hoped by this exchange offer to eliminate some 18 million dollars of arrearages on its 5½% stock, and because of the effect of the injunction below the Corporation is unable to take major steps in regard to its business.

Alleghany is unable to pay dividends on either its 5½% or its 6% stock, because if it were to pay dividends on its 5½% stock it would have to pay them on the entire issue, and Alleghany is unable to determine at this time what is the entire issue of 5½% stock or whether the 6% stock is entitled to dividends. It is respectfully suggested that a large public corporation which cannot know what its capitalization is; which cannot proceed with its major corporate affairs because of the confusion engendered by the lower court's ruling; which cannot pay dividends as

it does not know to whom to pay them; and which cannot hold its annual stockholders' meeting, should be entitled to a prompt determination of the numerous problems forced upon it by what we respectfully submit is a most ill-advised, improvident and unfair injunction.

Alleghany filed a notification of registration with S. E. C. in December of 1955, after the coming down of the District Court's opinion on final decree, because if it did not do so, and the District Court were not reversed, its ordinary day-to-day business activities might well be illegal. When it so registered, it did so on the terms and conditions set forth in the attached letter (marked Appendix A) filed with its notification of registration. If, as we believe, Alleghany is and always was under the jurisdiction of the I. C. C., such registration may be a nullity, for it may be that the filing by Alleghany of a notification of registration with S. E. C. cannot divest I. C. C. of jurisdiction to regulate Alleghany, if, as I. C. C. and Alleghany believe, I. C. C. in fact has jurisdiction to regulate Alleghany. Yet in the present state of confusion caused by the injunction Alleghany does not know to which agency to make reports; which agency is the proper one to regulate it; or on what basis to keep its records as the requirements of these agencies differ with respect thereto.

The harm to Alleghany and its stockholders, as related above, was clearly recognized by Circuit Judge Hincks in his dissenting opinion on interlocutory injunction (Document 1 of Separate Appendix to Alleghany's Statement as to Jurisdiction).

It is strenuously urged that this cause should be advanced on the calendar and be heard at the earliest possible time for the reasons above stated.

In view of the imperative need of Alleghany and its stockholders for prompt determination of their rights on appeal the Supreme Court is earnestly urged to make an

order within the shortest possible time permitting the following variation in the normal time intervals and procedures prescribed in the Revised Rules of this Court to bring on a case for hearing, or for such other relief of similar nature as this Honorable Court may deem proper and desirable. Some of the relief hereinafter requested is provided for in Rule 41(4) in critical circumstances such as we believe to be present here.

I. That the requirement of Rule 17(1) be waived so as to permit appellant Alleghany to serve its designation of portions of the record to be printed one (1) day after this Court has granted this motion.

II. That appellees be required to file, as is required by Rule 17(2), within ten (10) days after receipt of the aforesaid designation of Alleghany, a cross-designation of additional parts of the record, the printing of which they deem material.

III. That the Clerk of this Court be requested forthwith upon filing of the designation and cross-designation as aforesaid to make an estimate of the cost of printing the record and of his fee for preparing it, as required by Rule 36, and that upon payment of such estimated sum by appellant Alleghany be requested to proceed with the printing of the record for the use of the Court and of counsel.

IV. That if this Court notes probable jurisdiction the cost of printing of the record be dealt with in usual course as costs of the action, as provided by Rules 36 and 57.

V. That if Alleghany files its brief, as it agrees to do, within one (1) day after this Court notes probable jurisdiction or four (4) business days after receipt of a copy of the record as printed in accordance with paragraphs I through III above, whichever date is the later (the alternative times being necessary to enable

Alleghany to insert record references in its brief as required by Rule 40 (3)), appellees then be required to file their briefs within twenty (20) days after the date of receipt by them of Alleghany's brief instead of the usual thirty (30) days customarily provided by Rule 41.

For all the foregoing reasons, it is earnestly requested that the aforementioned motion be granted in all respects.

Dated: February 7, 1956.

Respectfully submitted,

DAVID HARTFIELD, JR.,
EDWARD K. WHEELER,
Counsel for Petitioner.